Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1585

UNITED STATES OF AMERICA, PETITIONER,

v.

RICHARD RUSSELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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* The opinion of the Ninth Circuit is printed at page 12 of the Petition for a Writ of Certiorari.

Relevant Docket Entries

Date	Proceedings
Feb. 25, 1970	Filed Indictment.
Mar. 6, 1970	Enter Arraignment and Plea, not guilty, Counts II, III and IV, defendant Russell.
Mar. 6, 1970	Enter order setting trial for June 22, 1970, 9:30 A.M.
	. . . .
June 22, 1970	Enter RECORD OF TRIAL BY JURY (1st day). Wilford Mayrand, Reporter. Exhibits. O. J. Humphrey present as counsel for defendant Russell.
June 22, 1970	Enter order for bench warrant defendant John Connolly, for failure to appear for trial. Issued Warrant.
June 23, 1970	ENTER RECORD OF TRIAL BY JURY (2nd day) as to defendants Patrick Connolly and Richard Russell.
June 24, 1970	ENTER RECORD OF TRIAL BY JURY (3rd day) Defendants P. Connolly and Russell.
June 24, 1970	Filed Verdict of Guilty as to Counts II, III and IV as to Defendant Russell.
June 24, 1970	Filed verdict of Guilty as to Counts I to V inc. as to Defendant Patrick Connolly.
	. . .
June 29, 1970	Filed motion for new trial, defendant Russell and memorandum.
	. . .
July 2, 1970	Sentence: Richard Russell confined for TWO YEARS on Count II, suspended on condition that Defendant serve SIX MONTHS and probation for Three years. Same sentence on Counts III and IV, sen-

	tence on each of Counts III and IV to run Concurrent on Count II.
July 2, 1970	Filed and Enter Judgment and Commitment as to Defendant RUSSELL.
July 2, 1970	Enter Order Denying Defendant Russell's Motion for new trial.
July 10, 1970	Filed Defendant Russell's Motion for Leave to Appeal IFP.
July 10, 1970	Filed Affidavit and Order allowing defendant Russell to appeal IFP.
July 10, 1970	Filed Defendant Russell's Notice of Appeal.

DIRECT EXAMINATION

By Mr. PIDWELL:

Q. Agent Shapiro, what is your occupation?

A. I am a special agent for the Bureau of Narcotics and Dangerous Drugs.

Q. And how long have you been so employed?

A. Approximately one and one-half years.

Q. Do you have any prior law enforcement experience?

A. Yes, sir.

Q. And what was that?

A. I was employed by the California Bureau of Narcotics Enforcement for approximately one and one-quarter years.

Q. Now as an agent for the Bureau of Narcotics and Dangerous Drugs, will you describe generally your duties with the Bureau?

A. My activities involve undercover enforcement, where I usually play the role of a narcotics or drugs violator, who attempts to locate other drug violators.

Q. Now I direct your attention to December 7, 1969; were you then acting in an undercover capacity?

A. Yes, sir, I was.

Q. And at that time did you meet the defendants in this action?

A. Yes, sir.

Q. Would you point out to the jury, and indicate to them the names of the defendants?

A. Mr. Richard Russell is the one over at the table with the yellow shirt and the tie; and Mr. Patrick Connolly, Seated to the rear is wearing the green and orange shirt.

Q. Now where did you meet the defendants is this action?

A. I met them at a residence on Whidbey Island, Route 1, Box 128.

Q. Did you later find out whose residence this was?

A. Yes, I later determined this to be the residence where Richard Russell was living.

Q. And about what time of the day did you meet them?

A. Approximately 6:00 p.m.

Q. Now under what circumstances did you meet them; will you describe the introduction?

A. I went to the residence with an individual by the name

of Allen, and at the residence I was introduced to John Connolly, Patrick Connolly, and Richard Russell.

Q. Did you indicate to them your undercover story?

A. Yes, sir.

Q. And what did you tell them?

A. I told Richard Russell, and John and Pat Connolly that I represented an organization interested in controlling the manufacture of methamphetamine, that I represented the organization in the Northwest area, and I wanted to meet with the people who were manufacturing the methamphetamine, and I wanted to obtain methamphetamine from them. For this I would provide them with one of the chemicals used in the manufacture of methamphetamine, and also, I would be willing to purchase the methamphetamine that they manufactured.

Q. What was the chemical that you would furnish them?

A. The chemical was known as Phenyl-2-Propanone.

Q. Now who was present in the house on that occasion?

A. Myself, this individual by the name of Allen, John Connolly, Patrick Connolly, Richard Russell, and there were two females, one I believe was Cheryl Blakely, and there was another male individual by the name of Clay.

Q. Now when you told them your cover story, what did anyone say?

MR. HUMPHREY: Objection, it would be hearsay, your Honor.

THE COURT: It may be an admission against interest.

MR. PINNELL: It is part of the res gestae of the transaction.

THE COURT: Well, you haven't identified, the time, the place, the circumstances.

Q. (By Mr. Pinnell) When you arrived at the residence, who was at the residence?

THE COURT: Well, he has already stated that.

MR. PINNELL: Then I asked him, after telling them his cover story, did anyone say anything.

THE COURT: Well he can answer that yes or no.

A. Yes, sir.

Q. Who said what?

A. Patrick Connolly——

MR. HUMPHREY: Your Honor, I will object again; we don't know what we are getting into.

THE COURT: Well that is not a good ground for an objection, not knowing what you are getting into. He has asked the witness to testify, Counsel, as to who said what, and he said that Patrick Connolly said something, and he is the defendant here; so I am going to permit him to answer. What did he say?

Q. (By Mr. Pinnell) What did Patrick Connolly say?

A. He stated to me that he had been manufacturing methamphetamine since May of 1969, that since May, up to that time, he had manufactured approximately three pounds of methamphetamine, also that he had learned to manufacture this from other individuals in the Portland, Oregon area.

Q. At that time did anything happen?

A. I stated to Patrick Connolly that I would be willing to provide him with Phenyl-2-Propanone for one-half of the methamphetamine that he manufactured. I also stated to him that before I would provide him with any Phenyl-2-Propanone, I wanted a sample of the methamphetamine that he was manufacturing, and I also wanted to watch his operation. At that time John Connolly handed me a small plastic bag containing a white powder. John Connolly stated to me "This is the last of the last batch that we made."

Q. Now do you recall where John Connolly took that package from? Or did he just hand it to you?

A. He just handed it to me.

Q. Was he carrying it on his person?

MR. HUMPHREY: I object, your Honor.

THE COURT: Well, I will sustain on that. That would be speculation.

Q. (By Mr. Pinnell) At that time, what if anything did you do?

A. I asked Pat Connolly if I could see his laboratory. He agreed to me, and Pat Connolly and I left the residence, entered my government vehicle, and proceeded to drive to a wooded residence located on Lot 30, Deer Lake Haven, on Whidbey Island. There was no house number or street name at this location.

Q. Whose residence was that?

A. This was the residence of Patrick Connolly.

Q. And what happened after you arrived there?

A. At the residence, Patrick Connolly showed me several items of laboratory equipment, and several chemicals.

Q. Where was this laboratory equipment located in Patrick Connolly's house?

A. It was located in the living room and kitchen area of the house.

Q. After you saw the laboratory equipment, what if anything did you do?

A. Patrick Connolly and I then left the residence and returned to the residence located at Route 1, Box 128. At that location I agreed to meet with Richard Russell and Pat Connolly the following day.

Q. Did they ask you to come there that following day?

A. Yes, sir.

Q. About what time of day was that?

A. It was then about 7:00 p.m.

Q. And what did you do?

A. At that time I left the residence, met with my surveilling agent, and returned to Seattle.

Q. Now when you were at Patrick Connolly's house, did you see any empty bottles?

A. Yes, sir.

Q. What did you observe?

A. There was one empty bottle labeled Phenyl-2-Propanone.

Q. December 9th.

A. Yes, sir.

Q. And in doing that, did you go to Whidbey Island?

A. Yes, sir.

Q. When did you first arrive on Whidbey Island?

A. At approximately 3:30 p.m.

Q. And what did you do after your arrival there?

A. I went to Mr. Connolly's residence, but nobody was home. And I went to Mr. Russell's residence, he was not there, but there was a female there at the residence by the name of Teddy. I remained at the residence for awhile and then left. I returned again to Mr. Russell's residence at approximately 5:40 p.m. Approximately fifteen minutes later Mr. Russell, Pat Connolly, Cheryl Blakely, and an individual by the name of Pat Hanson arrived. We re-

mained at that residence for a short time, and then Pat Connolly, Richard Russell, Pat Hanson and Cheryl Blakely left the residence, I followed them, and——

Q. Approximately what time was this?

A. This was approximately 6:00 p.m.

Q. Then how long did you remain at the Russell residence with these other four individuals?

A. Approximately five or ten minutes.

Q. Then what happened?

A. I followed them down to Mr. Connolly's residence, we all entered the residence. Shortly thereafter, Cheryl Blakely and Pat Hanson left the residence.

Q. At approximately 7:00 p.m. did anything unusual happen?

A. Yes, sir.

Q. What happened?

A. Pat Connolly proceeded to measure out lengths of aluminum foil from a roll of aluminum foil.

Q. About how long were they?

A. He was measuring out lengths approximately the width of his arms. He then cut these up into smaller pieces, and then he and Richard Russell cut these up into smaller pieces, and then he and Richard Russell placed the smaller pieces of aluminum foil into a 4,000 millimeter flask.

Q. Could you tell us approximately how large a 4,000 millimeter flask is?

THE COURT: Show them with your hands.

A. It would be about that tall.

Q. About a foot high?

A. It would be less than a foot; it is about six inches at the base, and tapering to about two inches at the top.

Q. And what did they do with the aluminum foil?

A. This was placed into the flask.

Q. Who placed it into the flask?

A. Both Richard Russell and Pat Connolly.

Q. Where were they at this time?

A. At this time, Richard Russell, Pat Connolly and myself were in the living room of Pat Connolly's residence.

Q. Would you then tell the jury what if anything happened?

A. Yes; Pat Connolly took the flask into the bathroom,

I followed him to the bathroom, Mr. Connolly then added some water to the flask from the shower, he then drained the water out, and he then proceeded to add a number of chemicals, he added a quantity of isopropyl alcohol, methylamine, a small quanity of lye, a quantity of mercuric chloride, and then he asked me for the Phenyl-2-Propanone. I then gave Mr. Connolly, I gave him a bottle, one hundred grams, of Phenyl-2-Propanone.

Q. Then what did you do?

A. He added the contents of the bottle of Phenyl-2-Propanone into the flask, he placed the stopper on this flask and taped the stopper to the flask and shook the flask gently and placed it in the shower. To the stopper was attached a rubber hose and he inserted the opposite end into the drain of the shower.

Q. Could you tell why he put it into the drain of the shower?

A. When all of the chemicals were added to the flask, a chemical reaction occurred and very strong fumes began to emanate, and the hose leading down into the drain of the shower took off some of the fumes.

Q. Then what happened?

A. Periodically during the next two hours, or so, Connolly would feel the outside of the flask with his hand, and at times he would wrap it with wet towels, and other times he would place the electric heater near the flask.

At approximately 8:30 p.m. I left the residence for a short time. I met with the surveilling agent and advised him what was happening in the residence. I then purchased some soft drinks and some pastry which I brought back to the residence, and I remained in the residence, after the reaction took place, for approximately two hours.

Q. Do you have any idea of the time sequence here?

A. It was approximately, I would say, 7:30, or thereabouts, all the chemicals were added to the flask, and the chemical reaction was started in the flask, the bubbling contents then changed to a gray murky color. This went on for about two hours, approximately 9:30, or thereabouts.

Q. You had already gone out to the store at that time and had come back?

A. And had returned, yes. After the reaction had stopped in the flask, Mr. Connolly then took four glass

bottles, took four funnels, and in the funnels he placed paper towels, in each of the four funnels, and then he placed a funnel into each of the four bottles, and poured the contents of the flask into each of the bottles. In the bottom of the bottles collected a relatively clear liquid.

Q. What did he do with that liquid?

A. He took the liquid that collected in one bottle, he poured this into a pyrex baking dish. To this he added several drops of acid, he stirred this around and tested it a P Hydrian test paper.

Q. And what is P Hydrian test paper?

A. These are chemically-treated strips of paper that indicate by different colors the strength of an acid or alkali.

Q. And then what happened?

A. After the color changed to the color that Mr. Connolly desired, he placed this pyrex baking dish with the liquid in it on the electric hotplace, turned on the hotplate, and then took a woman's hair dryer and blew hot air over the liquid. After awhile the liquid dried to a white crystaline powder, which Mr. Connolly then scraped off the baking dish, put it into a plastic bag and handed it to me. This was approximately 11:40 a.m. on December 10th.

Q. The following day?

A. Yes.

Q. At that time did you note the approximate weight of the material?

A. Yes, I weighed the bag and its contents on a small balance scale, and it weighed approximately eleven and a half grams.

A. Mr. Russell scraped the white powder that had dried in the baking dish four times, Mr. Connolly did it once.

Q. Mr. Connolly was drying the material, and this was at the same time that Mr. Russell was scraping the pyrex dishes?

A. Yes.

Q. And what then happened?

A. Mr. Connolly stated to me that I could have the rest of that batch, at which time Mr. Russell stated, "After I get my half."

Q. Did you say anything about that?

A. No, I didn't.

Q. When then happened?

A. Mr. Russell had collected the powder into plastic bags; there were three small plastic bags. I was at that time given one of these bags. I then offered——

Q. Who gave you the bag?

A. Mr. Russell. I then offered Mr. Russell $75.00 to purchase the remainder, the remaining two plastic bags of the powder.

Q. What did Mr. Russell say?

A. Mr. Russell stated that he already had one-quarter sold for $65.00, and that he would have to think about selling me the remainder.

* * * * *

Q. Is that the same exhibit that was given to you by Mr. Russell?

A. Yes, sir, it is.

Q. What did you do with it after you obtained it on that morning?

A. I kept it in my personal custody.

Q. Then what did you do with it?

A. I secured it at the Bureau of Narcotics and Dangerous Drugs office at Seattle, Washington, and on December 12, I mailed it via registered mail to the San Francisco Regional Lab Office of the Bureau of Narcotics and Dangerous Drugs.

Q. Did you ever take the weight of that exhibit?

A. Yes, sir, I did.

Q. What was the approximate weight?

A. About 7.4 grams.

Q. Now returning then to that morning; after you obtained Exhibit Number 3 for identification, what if anything occurred?

A. Mr. Connolly, Mr. Russell and I then left Mr. Connolly's residence, we entered my government vehicle and proceeded to drive towards Mr. Russell's residence.

Q. Did anything happen in the car?

A. While driving toward Mr. Russell's residence, Mr. Russell stated to me that he would sell me the larger plastic bag he had for $60.00. I agreed to buy them from him at that price.

* * * * *

to January 7, 1970; on that day did you have occasion to see any of the defendants in this action?

A. Yes, I did.

Q. Where was that?

A. That was at the residence of Patrick Connolly.

Q. What time did you arrive there?

A. Approximately 1:15 p.m.

Q. When you entered the premises, what did you observe?

A. I was admitted to the premises by a female by the name of Teddy, and I observed John Connolly sleeping in the living room; Cheryl Blakely led me into the bedroom where I met with Patrick Connolly.

Q. Then what happened?

A. I asked Mr. Connolly if he was still interested in our business arrangement. Mr. Connolly stated that he was, however he stated that he had since acquired two bottles of Phenyl-2-Propanone, and would not be finished with that until approximately Friday of that week, which would have been Jannary 9th, 1970.

Q. Did anything further occur at that time?

A. I asked Mr. Connolly if he had any methamphetamines, he stated he did, and he then instructed Cheryl Blakely to get a bottle out of the refrigerator. Cheryl Blakely left the bedroom, and returned a few minutes later and handed me a brown bottle that was cold to the touch. I examined the contents of the bottle, which was a white powder. Mr. Connolly asked me if I wanted any. I stated, okay, and Cheryl Blakely then placed a small quantity of this powder into a plastic bag and handed it to me.

• • • • •

Q. Now Agent Shapiro, I will ask you whether on January 10, 1970 you had occasion to return to the Connolly residence?

A. Yes, I did.

Q. What was the purpose of your returning to the Connolly residence on that date?

A. I went to the residence to arrest Patrick and John Connolly, and to serve a search warrant at John and Pat Connolly's residence.

• • • • •

THE WITNESS: This is an empty five hundred gram bottle of Phenyl-2-Propanone.

(Plaintiff's Exhibit Number 37 marked for identification.)

MR. PENNELL: Is that the same bottle that you brought over when you were there, Mr. Shapiro?

THE WITNESS: No, sir.

* * * * *

THE WITNESS: This is a brown bottle, one hundred grams of Phenyl-2-Propanone.

(Plaintiff's Exhibit Number 40 marked for identification.)

MR. PENNELL: Excuse me, is that the same bottle that you brought over that one time?

THE WITNESS: Yes, sir, that is; the right-hand corner of the label was crimped down by me at the time I brought it over, as you will notice here.

* * * * *

THE WITNESS: This next one is a brown bottle labeled Phenyl-2-Propanone, found by me in a cabinet in the living room.

MR. PENNELL: Mr. Shapiro, is that the bottle that you took over when you went over there?

THE WITNESS: No, sir.

* * * * *

A. Yes, sir, there was one large bottle, I believe, that was labeled 1-Proponal, and there was another bottle I believe labeled 2-Proponal; these I believe are a form of alcohol.

Q. That is Proponal, not Propanone, they are two different things?

A. That is correct.

Q. And a person cannot get the Propanone from a supply house unless he has a manufacturer's license, can he?

A. No, sir, he can't purchase Phenyl-2-Propanone at a chemical supply house——

Q. Without a license?

A. That is correct.

Q. The same stuff that you gave him in this small bottle?

A. That is correct.

* * * * *

Q. Did you tear up any foil and put it in the flask?

A. I put in several pieces of tin foil that had fallen on the floor; I did not tear up any foil.

Q. You were right in the immediate area while they were tearing up the foil and putting it in the flask, is that correct?

A. That is correct.

Q. Did you put the alcohol in the flask?

A. No, sir.

Q. Then after the alcohol, what was the—they put in the foil and they put in the alcohol; what was the next ingredient?

A. Initially the aluminum foil was put it, then it was dampened with water from the shower—I don't recall the exact order, but Methylamine, isopropyl alcohol, lye, and mercuric chloride, and Phenyl-2-Propanone were added to the flask. The Phenyl-2-Propanone was the last item added to the flask.

Q. Did you assist in any way in mixing the contents, or adding any of the items of the contents to the flask?

A. No, sir.

Q. But you were right there in the immediate area and watched them?

A. That is correct.

Q. Did you talk to them during this process?

A. Yes, sir.

Q. Did you tell them what to do?

A. No, sir.

* * * * *

CROSS EXAMINATION

By MR. PRINCE:

Q. Good morning, Mr. Shapiro. I do not want to repeat the questions asked by Mr. Butler, but I do want to get this straight; the drug that you supplied, or the chemical that you supplied to Connolly and Russell was one Phenyl-2-Propanone?

A. This was a 100-gram bottle of Phenyl-2-Propanone.

Q. And it is also your statement that the public can buy this from a drug firm?

A. It is sold at chemical supply houses.

Q. For instance, could I go down to a drug supply and buy this?

A. If they would sell it to you, yes.

Q. And why do you say, if they would sell it to me?

A. There are a number of drug firms that have voluntarily taken it off the market.

Q. Why is this?

A. This was done at the request of our Bureau, to help control the illicit manufacture of drugs.

Q. Well is it a fair statement that this drug may have been hard to obtain on or about December 9th and 10th of 1969?

A. That is correct.

Q. This was your role in the production then, to supply the defendants with this chemical?

A. Yes, sir, I did supply them with the chemical.

Q. Is that why you went to their residences on December 6th and December 7, 1969?

A. Yes, sir.

Q. Why didn't you sell it to them on December 7, 1969?

A. My intention was not to sell it to them, my intention was to locate their clandestine laboratory where drugs were being manufactured.

Q. When did you locate laboratory?

A. The first time I saw the entire laboratory was on the evening of December 9, 1969.

Q. Did you tell them at any time on the 7th of December that you could obtain the Propanone?

A. I told them that I could obtain and supply them with Phenyl-2-Propanone.

Q. On December 7th?

A. That is correct.

Q. Did you supply this to them on December 8th?

A. No, sir.

Q. Why not?

A. They were not ready to show me their laboratory, or produce any drugs on that date.

Q. Was a sale or deal discussed, concerning the transfer of the drugs?

A. On December 7th the conversation involved my offering to supply these individuals, Richard Russell, Patrick Connelly and John Connolly, with Phenyl-2-Propanone in return for one-half of their production of methamphetamine.

Q. On December 9th, do you recall seeing this drug on or

about their premises? I am referring to one hundred grams of Phenyl-2-Propanone.

A. I saw this on the premises; I brought it on their premises with me on December 9, 1969.

Q. Did you see any other bottles containing this chemical or drug, on or about December 9, 1969?

A. No, sir.

Q. Did they indicate to you that they had this drug or chemical on their premises on December 9, 1969?

A. No, sir.

Q. Is this drug necessary for the manufacture of methamphetamines?

A. For this method of production of methamphetamine, yes, sir, it is.

Q. And when you say for this method of production, you mean as it was so set up on the premises, the Connolly residence, on December 9th?

A. That is correct.

Q. To the best of your knowledge was there a production of this methamphetamine on December 8, 1969?

A. No, sir.

Q. On December 7, 1969?

A. No, sir.

Q. Do you know why?

A. No, sir.

Q. Did they discuss with you that there was no Propanone, that they had no Propanone?

A. This was probably discussed, yes.

Q. It was probably discussed that they didn't have any?

A. Yes, that is right.

Q. So with all the laboratory equipment and chemicals that have been admitted into evidence, without this one chemical or drug this production could not have been successful, or would not have produced the methamphetamine?

A. That is correct, this is a prime chemical used in the manufacture.

* * * * *

Q. I am not going to belabor the issue, and actually it may be my confusion, certainly it is somewhat complicated, but there was only one reaction which began on the night of the 9th, and was completed sometime during the morning of the 10th, is that correct?

A. That is correct.

Q. And when did you receive your final supply of methamphetamine?

A. I received my last sample of methamphetamine from Mr. Russell at approximately 11:45 a.m., on the morning of the 10th.

Q. Who had the balance of the methamphetamine after the reaction? Do you understand my question?

A. I think I do.

Q. Then you—would you answer?

A. Mr. Russell.

Q. Why did Mr. Russell have it?

A. Based on my conversations with Mr. Connolly and Mr. Russell earlier, it was my impression that Mr. Connolly——

Mr. Burton: Your Honor, I object to his question on the basis that it is calling for the witness' impression——

The Court: Well I think that is a valid objection; however, it is an unusual situation. Well, all right, I will sustain your objection to his question; it calls for a conclusion, rather than what they said.

The question was, why did Mr. Russell keep the balance of the methamphetamine.

Q. (By Mr. Prince) Was Mr. Russell the seller?

A. Yes, sir.

Q. He sold methamphetamine?

A. Yes, sir.

Q. Did you purchase it all from Mr. Russell, or did he have a quantity left?

A. I purchased part of what he had left.

Q. What happened to the remainder?

A. He kept it with him.

. . . . . .

Q. Now you have been in the courtroom and you heard Mr. Shapiro testify as to the process that he observed on December 9th and 10th, where the chemicals were put together to form methamphetamine?

A. Yes, sir.

Q. And in your recent testimony where you were talking about the most common manner of the production of methamphetamine——

A. Yes.

Q. The operation that Mr. Shapiro saw was this most common method of manufacturing methamphetamines, was it not?

A. Yes.

Q. And in this method that Mr. Shapiro observed, Propanone is a necessary ingredient, is it not?

A. I don't quite understand; Phenyl-2-Propanone is a necessary ingredient?

Q. Yes.

A. Yes, sir, it is.

Q. And you can have everything else, and if you don't have the Propanone, you cannot manufacture methamphetamines?

A. No, without the Phenyl-2-Propanone you could not get the reaction to get methamphetamine.

Q. Absent the Propanone, you put everything else in there as described by Mr. Shapiro, what would you get?

A. Not a great deal of any kind of product, you see, because the product depends upon the reaction of the Phenyl-2-Propanone, this is the whole idea. The other things that are there are simply for solvents, or for the generation of hydrogen for condensation.

Now this is the entrapment instruction, and it is quite simple.

The defendants assert that they were victims of entrapment as to the crime charged in the indictment.

Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such cases.

On the other hand, where a person already has the willingness and the readiness to break the law, the mere fact that the government agent provides what appears to be a favorable opportunity is not entrapment.

If then the jury should find beyond a reasonable doubt from the evidence in the case that before anything at all occurred respecting the alleged offense involved in this case, the defendants were ready and willing to commit the crimes such as charged in the indictment, whenever opportunity was afforded and that the government officer did no

more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment.

On the other hand, if the evidence in the case should leave the jury with a reasonable doubt whether the defendant had the previous intent or purpose to commit the offense of the character here charged, and did so only because he was induced or persuaded by some officer or agent of the government, then the jury should acquit him, or them, I should say.

SUPREME COURT OF THE UNITED STATES

No. 71-1585, ...

UNITED STATES,
Petitioner,

v.

RICHARD RUSSELL

ORDER ALLOWING CERTIORARI. Filed ..... October 13, 1972
The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ..... Circuit is granted.

☆ U.S. Government Printing Office: 1972—488-233/294

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71—

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD RUSSELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit reversing a conviction for manufacturing and selling a prohibited drug on the ground that, even though respondent was predisposed to commit the offenses with which he was charged, the conduct of the federal undercover agent in supplying an ingredient for manufacture of the prohibited drug constituted "an intolerable degree of governmental participation in the criminal enterprise."

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (App., *infra*, pp. 12-21) are not yet reported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, p. 22) was entered on April 6, 1972. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including June 5, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether under the circumstances of this case the fact that a government agent furnished means for the commission of an offense, which the defendant was predisposed to commit, and did commit, affords a defense against conviction.

STATEMENT

After a jury trial with co-defendant Patrick Connolly in the United States District Court for the Western District of Washington, respondent was convicted of having unlawfully manufactured and processed methamphetamine, in violation of 21 U.S.C. 331 (Supp. V) (q)(1) and 360a(a), and of having unlawfully sold and delivered that drug, in violation of

(1964ed. Supp V)
21 U.S.C. 331(q)(2) and 360a(b).[1] Respondent was sentenced to six months' imprisonment to be followed by three years' probation. On appeal the court reversed the convictions, one judge dissenting (App., *infra*, pp. 12-21).

1. The evidence showed that on December 7, 1969, Agent Shapiro of the Federal Bureau of Narcotics and Dangerous Drugs, acting in an undercover capacity, met with respondent and his co-defendants, Patrick Connolly and John Connolly, at the respondent's home on Whidbey Island, Washington (Tr. 4-5).[2] Shapiro told them that he represented an organization in the Pacific Northwest interested in controlling the manufacture of methamphetamine; that he wanted to purchase methamphetamine from them; and that he would supply the phenyl-2-propanone, one of the chemicals necessary to the manufacture of the drug, in return for one-half the amount of methamphetamine produced (Tr. 5-6). Patrick Connolly told Shapiro that he had been manufacturing methamphetamine since May 1969 and had produced about three pounds of that drug (Tr. 7). Shapiro indicated that before he furnished any phenyl-2-propanone he wished to see their laboratory and a sample of their methamphetamine (Tr. 7-8). John

[1] The indictment was in five counts but only three charged respondent. Patrick Connolly was convicted on all five counts; John Connolly was also named as a defendant but did not appear for trial.

[2] "Tr." refers to the transcript of proceedings at trial, which the government has lodged with the Clerk of this Court.

Connolly then gave Shapiro a bag containing a quantity of methamphetamine, indicating that it was from "the last batch that we made" (Tr. 8), and shortly thereafter Shapiro left with Patrick Connolly to view the laboratory, which was located in the latter's home on Whidbey Island (Tr. 8, 69-70). In the laboratory Shapiro saw an empty bottle labeled phenyl-2-propanone (Tr. 9).

On the evening of December 9, 1969, Shapiro met with Patrick Connolly and respondent at the laboratory (Tr. 19-20). Respondent and Connolly prepared a large flask with pieces of aluminum foil and other chemicals* (Tr. 20-21). At Connolly's request, Shapiro provided him with a bottle containing 100 grams of phenyl-2-propanone, which Connolly added to the flask (Tr. 21-22). During that night, Connolly and respondent manufactured a batch of methamphetamine (Tr. 22-24, 104). Shapiro received part of the drug pursuant to their agreement and the rest was given to respondent (Tr. 24, 27-29). Shapiro later purchased some of respondent's portion of the methamphetamine for $60 (Tr. 31).

On January 7, 1970, Shapiro met again with Patrick Connolly and asked if he was still interested in their "business arrangement" (Tr. 33). Connolly said that he was but that he had recently acquired two bottles of phenyl-2-propanone from a different source and would not be finished with those for a

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* Shapiro put in several pieces of foil that had fallen to the floor but did not otherwise participate in the manufacturing process or direct the work (Tr. 71, 87).

few days (*ibid.*). Shapiro obtained additional methamphetamine from Connolly at that time (Tr. 33-34, 103-104). On January 10, 1970, Shapiro returned to Connolly's residence with a search warrant and seized, among other items, an empty 500 gram bottle of phenyl-2-propanone and a 100 gram bottle partially filled with phenyl-2-propanone (Tr. 35, 46, 50, 95-96). The 100 gram bottle was not the one previously supplied by Shapiro (Tr. 50).

Agent Shapiro testified on cross-examination that a number of chemical supply firms had voluntarily ceased selling phenyl-2-propanone at the request of the Federal Bureau of Narcotics and Dangerous Drugs, and that the chemical may have been generally difficult to obtain around December 9, 1969 (Tr. 81). Both Shapiro and a government chemist testified that phenyl-2-propanone is an essential ingredient in the method used by respondent and Connolly to manufacture methamphetamine (Tr. 84-85, 112-113).

Respondent did not testify or introduce any evidence. He made motions for acquittal based on a claim of entrapment which were denied (Tr. 114-118, 161).[4] Patrick Connolly testified and admitted having told Shapiro that he had manufactured three

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[4] The district judge gave the Ninth Circuit's approved instruction on entrapment, which admonished the jury to acquit if under the evidence it had a "reasonable doubt whether the defendant had the previous intent or purpose to commit the offenses * * * and did so only because he was induced or persuaded by some officer or agent of the government" (Tr. 179-180).

pounds of methamphetamine prior to the meetings with Shapiro, although he asserted that his statement had been untrue (Tr. 148-149).

2. Notwithstanding the fact that respondent had harbored a predisposition to commit the offense (App. *infra*, pp. 13, 18), the court of appeals reversed respondent's conviction on the ground that the fact that a federal undercover agent supplied an ingredient needed to manufacture the illicit drug constituted "an intolerable degree of governmental participation in the criminal enterprise" (App., *infra*, p. 14). This determination was apparently based upon the factual assumption that "there could not have been the manufacture, delivery, or sale of the illicit drug had it not been for the government's supply of one of the essential ingredients." (App., *infra*, p. 13).

The court developed two alternative legal theories to support its conclusion. First, the court reasoned that governmental furnishing of the means of committing a charged offense constitutes entrapment as a matter of law even if the defendant was predisposed to engage in the criminal activity (App., *infra*, pp. 14-15). Second, assuming arguendo that such a predisposition would vitate the traditional defense of entrapment, the court reasoned that such "overzealous law enforcement" contravened "fundamental concepts of due process" (App., *infra*, pp. 15-17).

Judge Trask, dissenting, disapproved of the majority's "unnecessary effort to enlarge the doctrine of entrapment beyond the limitations of * * * *Sherman* v. *United States* * * *" (App., *infra*, p. 21), and em-

phasized that the majority's factual assumptions were not supported by the record, since respondent had obtained phenyl-2-propanone for the manufacture of methamphetamine from sources of his own both before and after being supplied by the government agent (App., *infra*, pp. 18-21).

REASONS FOR GRANTING THE WRIT

The issue in this case is of fundamental importance to the conduct of legitimate investigations into criminal activity. The decision below that a defense of entrapment may be based solely on governmental conduct conflicts with the decisions of this Court in *Sherman* v. *United States*, 356 U.S. 369, and *Sorrells* v. *United States*, 287 U.S. 435. Insofar as the decision rests on the due process clause of the Fifth Amendment, it presents a novel question of federal law which should be settled by this Court. Proper police investigations will be unduly hampered by recognition of this new defense against prosecution which is defined only by the vague and subjective test enunciated by the court of appeals.

1. The underlying rationale of the doctrine of entrapment is that "statutes • • • [ought not] to be enforced by tempting *innocent* persons into violations." *Sherman* v. *United States*, 356 U.S. 369, 372 (emphasis added). The Court there further noted that "[t]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." *Ibid.* In making this determination,

"[t]he predisposition and criminal design of the defendant are relevant." *Sorrells* v. *United States*, 287 U.S. 435, 451. Thus this Court has delineated the boundaries of the entrapment defense by looking to "a general intention or predisposition to commit * * * crimes of the kind solicited * * * rather than the conduct of the police * * *." *Sherman* v. *United States*, *supra*, at 382 (concurring opinion of Mr. Justice Frankfurter).

In this case, respondent, who was engaged in a course of criminal conduct both before and after the commission of the offense charged here, "candidly concedes that he may have harbored a predisposition to commit the charged offenses" (App., *infra*, p. 13). The court below nevertheless disregarded respondent's criminal predisposition and recognized a defense based solely upon the conduct of the government. In so doing, it departed from the entrapment guidelines set forth by this Court in *Sherman* and *Sorrells*. Moreover the decision below contributes to a growing conflict among the courts of appeals, compare *United States* v. *Mascia*, 447 F.2d 1111 (C.A. 2), with *United States* v. *Bueno*, 447 F. 2d 903 (C.A. 5).

Implicit in the court's entrapment analysis is the argument that *Sherman* and *Sorrells* may be distinguished as involving only solicitation and not the furnishing of means. However, this Court in *Sorrells* foreclosed such arguments by emphasizing that where a criminal predisposition is found to exist, "the fact that officers or employees of the Government merely afford opportunities or facilities for the com-

mission of the offense does not defeat the prosecution." 287 U.S. at 441. The term "facilities" encompasses the situation where, as here, in dealing with an individual who intends on his own to perfrom a criminal act, the government furnishes part of the means by which to do so.

2. Insofar as the decision below holds that the due process clause of the Fifth Amendment bars prosecution when there has been a certain degree of governmental participation in the criminal enterprise, it is without support in the decisions of this Court.[5] The Ninth Circuit attempted to justify its decision by reference to Mr. Justice Frankfurter's concurrence in *Sherman*, which was based on this Court's "supervisory jurisdiction over the administration of criminal justice" (356 U.S., at 381), but the theory of that concurrence was not accepted by a majority of this Court. And the broad defense recognized by the court below goes far beyond the finely articulated standard Mr. Justice Frankfurther suggested. He urged that in providing a defense based solely upon governmental conduct the Court should look to wheth-

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[5] *Raley* v. *Ohio*, 360 U.S. 423, cited by the court below, involved government advice to witnesses that they were privileged to refuse to answer questions under the privilege against self-incrimination followed by government prosecution for their failure to answer because the privilege was not available. The court held it a denial of due process to convict a witness who justifiably relied on mistaken advice by government officials that he was constitutionally privileged to remain silent. The case is far removed from the claim of entrapment as a defense to conviction for the performance of criminal acts.

er the behavior of the government agent was likely to result in the commission of crime only by "those engaged in criminal conduct and ready and willing to commit further crimes should the occasion arise * * * and not [by] others who would normally avoid crime." *Id.*, at 383-384. The action of the government agent here in offering to furnish phenyl-2-propanone in exchange for one-half of the methamphetamine to be manufactured therewith would certainly not seem to be such as to persuade one who would normally avoid that type of crime.

The decision below not only creates a novel defense based solely on governmental conduct, it creates a defense which is excessively broad and vague. Without close consideration of the precise nature of the government's conduct, the court below excused the commission of a crime with the general assertions that this was a case of "overzealous law enforcement," of "intolerable" or "repugnant" behavior of the government agent. Yet, the government agent here did not make repeated solicitations; he made no threats and engaged in no acts of coercion. The chemical he supplied was not an illicit substance, and although it was relatively difficult to obtain, respondent and his co-defendants had obtained it prior to the commission of the offense charged here and were able to do so subsequently as well. Aside from supplying the phenyl-2-propanone the government agent lent no aid to respondent's illegal venture; respondent and his co-defendants provided the other ingredients, the labor,

and the equipment needed to produce the methamphetamine. It therefore cannot be said that the government's involvement in respondent's criminal enterprise was either reprehensible or violative of the requirements of due process.

By creating an ambiguous, subjective standard for a defense based on improper governmental conduct the court below has placed a substantial obstacle in the path of proper investigations into criminal activity. The standards seemingly adopted by the court below—whether the degree of governmental participation in the criminal enterprise was "intolerable" or the conduct of the agent "repugnant" (see App., *infra*, at pp. 14, 17)—are inherently vague and certainly not susceptible to ready application in the course of legitimate undercover work. Furthermore, this transformation of the defense of entrapment into a shield for the criminally predisposed poses a threat to effective law enforcement generally.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

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JUNE 1972.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 26,485

UNITED STATES OF AMERICA, APPELLEE

vs.

RICHARD RUSSELL, APPELLANT

[April 6, 1972]

Appeal from the United States District Court for the Western District of Washington Northern Division

Before: KOELSCH, ELY and TRASK, Circuit Judges.

ELY, Circuit Judge.

Russell was convicted on three counts of violating the Federal Food and Drug Laws in manufacturing, processing, delivering, and selling a prohibited depressant or stimulant drug, methamphetamine. 21 U.S.C. §§ 331(q)(1), (2); 360a(a), (b). In this appeal, Russell urges that the participation of a Government Agent in the crimes was so overreaching as to constitute entrapment as a matter of law.

In December, 1969, a Special Agent of the Bureau of Narcotics and Dangerous Drugs met with Russell and several of the latter's codefendants. The Agent claimed that he represented an organization anxious to control the manufacture and distribution of meth-

amphetamine in the Pacific Northwest, and he offered to supply the chemical Phenyl-2-Propanone in exchange for one-half of the methamphetamine to be manufactured therewith. An agreement was reached, and several days later, the Agent provided the Phenyl-2-Propanone, and the methamphetamine was produced with the Agent's assistance. He received his share and also purchased an additional amount of the finished product from Russell.

The challenged conduct on the part of the Government's Agent was the supplying of the Phenyl-2-Propanone, a chemical essential to the manufacture of methamphetamine. The Agent himself testified that this chemical was difficult to obtain because one must have a manufacturer's license to purchase it at a chemical supply house and because many suppliers were, at the request of the Bureau of Narcotics, no longer selling it at all. Thus, there could not have been the manufacture, delivery, or sale of the illicit drug had it not been for the Government's supply of one of the essential ingredients.

While Russell candidly concedes that he may have harbored a predisposition to commit the charged offenses, he contends that he may still avail himself of the entrapment defense. Principally, he relies upon the concurring opinions of Justices Frankfurter and Roberts in *Sherman* v. *United States*, 356 U.S. 369, 378-85 (1958), and *Sorrells* v. *United States*, 287 U.S. 435, 453-59 (1932). These opinions propose a test for entrapment that focuses, not on the intent of the accused, but on the conduct of the Government:

> "The crucial question, not easy to answer, to which the court must direct itself is whether the police conduct revealed in the particular case

> falls below standards, to which common feelings respond, for the proper use of governmental power."

Sherman v. *United States*, 356 U.S. 369, 382 (1958) (Frankfurter, J., concurring).

The basic contention of the Government, in response to Russell's claim, is premised on the following statement of our court, drawn from the majority opinions in *Sherman* and *Sorrells*:

> "Entrapment is shown where Government agents go beyond the mere affording of opportunities or facilities for the commission of the offense and exert persuasion of one kind or another which induces the commission of a crime by one who has no predisposition to do so."

United States v. *Walton*, 411 F.2d 283, 288 (9th Cir. 1969). The Government argues that the plain import of this language is that one altogether forfeits an entrapment defense if he is "predisposed" to commit the crime.

We need not resolve the precise issue apparently presented by the parties. For regardless of the significance of "predisposition" as an element in "entrapment," we conclude that there is merit in Russell's contention that a defense to a criminal charge may be founded upon an intolerable degree of governmental participation in the criminal enterprise. Two theories for this defense have been advanced. Placing the defense within the ambit of the entrapment doctrine was the approach taken by our learned Brothers of the Fifth Circuit in *United States* v. *Bueno*, 447 F.2d 903 (5th Cir. 1971), and by District Judge Ferguson in his very carefully written opinion

in *United States* v. *Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970).

The facts of *Bueno* and *Chisum* are remarkably similar to those presented here. In *Bueno*, the defendant was supplied heroin by a government informer, but was nonetheless convicted for selling the same heroin to the Government Agent for whom the informer apparently was working, the sales having been arranged by the informer. In *Chisum*, the defendant was supplied counterfeit money by a Government Agent and then indicted for receiving the counterfeit bills with intent to pass them as genuine. In each case the court held that since the Government had supplied the defendant with the contraband, the defendant was entrapped as a matter of law, regardless of the accused's predisposition to commit the crime.[1]

The facts of the present case cannot fairly be distinguished from those of *Bueno* and *Chisum*. While it is true that Russell and his codefendants were supplied with only one ingredient of the illicit drug, that ingredient was as essential to the perpetration of Russell's alleged crimes as was the heroin in *Bueno* and the counterfeit money in *Chisum*. Russell would have been powerless to "commit" the charged offense without the Government's pervasive intervention.

The Government, in effect, contends that we are not free to adopt the *Bueno-Chisum* reasoning. Assuming, *arguendo*, that the Government is correct[2]

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[1] Both courts cited with approval the similar decision of the Illinois Supreme Court in *People* v. *Strong*, 21 Ill. 2d 320, 172 N.E.2d 765 (1961).

[2] Recent cases indicate that the contrary is true. Another panel of our court, after noting the existence of divergent

in its assessment of *Walton*, *supra*, as limiting the applicability of the "entrapment" defense to instances in which the defendant had no predisposition to commit the crime, an approach other than that relating to the strict "entrapment" defense requires reversal. Judge Hamley, the author of the *Walton* opinion, recently articulated the rationale underlying this alternative approach:

> ". . . although this is not an entrapment case, when the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative. Under these circumstances, the Government's conduct rises to a level of *"creative* activity" (*Sherman*, *supra*, at 372), substantially more intense and aggressive than the level of such activity charged against the Government in numerous entrapment cases we have examined."

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views concerning the basis of the entrapment doctrine, has written that "the fact remains that it is the unbecoming conduct of the Government which calls the defense of entrapment into play." *United States* v. *Arcenaux*, 437 F.2d 924, 925 (9th Cir. 1971). *Cf. United States* v. *Bueno*, 447 F.2d 903, 906 (5th Cir. 1971); *United States* v. *Chisum*, 312 F. Supp. 1307, 1310 (C.D. Cal. 1970).

We also note that Judge Hamley, the author of the *Walton* opinion, upon which the Government relies in urging that lack of predisposition is an essential element of a successful entrapment defense, recently indicated that such is true only in "the usual entrapment defense." *Greene* v. *United States*, —— F.2d ——, —— (9th Cir. Nov. 23, 1971).

Greene v. *United States*, 454 F.2d 783 (9th Cir. Nov. 23, 1971).[4]

The holding of *Greene*, however, was limited to the unique circumstances there involved. The Government Agent in that case alternately prodded, threatened, encouraged, and aided the defendants in manufacturing and supplying him with bootleg whiskey. The conduct of the Agent in Russell's case was, hopefully, also unique; certainly it was equally repugnant, if not more so, than the conduct of the Agent in *Greene*. Thus, under the *Greene* rationale also, reversal is required.

Apparently, the only difference between *Bueno* and *Chisum*, as distinguished from *Greene*, is the label affixed to the result. Both theories are premised on fundamental concepts of due process [5] and evince the reluctance of the judiciary to contenance "overzealous law enforcement." [6] We do not choose to affix a label to our result; hence, we need not select between the alternative theories. Here, both compel the same disposition.

Upon remand, the indictment will be dismissed.

Reversed, with directions.

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[4] See also *Notaro* v. *United States*, 363 F.2d 169, wherein, at 178, we wrote: "It . . . [is] . . . not thought right or just that a Government should instigate and successfully pursue prosecution for the commission of an act which the prosecuted would not likely have committed but for the importunity of an Agent of the Government itself.

[5] *See Raley* v. *Ohio*, 360 U.S. 423, 79 S. Ct. 1257, 3 L. Ed. 2d 1344 (1959), discussed in *United States* v. *Chisum*, 312 F. Supp. 1302, 1310 (C.D. Cal. 1970).

[6] *Sherman* v. *United States*, 356 U.S. 369, 381, 78 S. Ct. 819, 825, 2 L. Ed. 2d 848, 856 (1958) (Frankfurter, J., concurring).

TRASK, Circuit Judge (dissenting):

The majority reverses this judgment of conviction upon the ground that the "participation of a Government Agent in the crimes was so overreaching as to constitute entrapment as a matter of law." I respectfully disagree.

The case was tried to a jury and the court sustained the verdict and rendered judgment thereon. There is no question but that Russell did the things he was charged with doing. In his brief to this court he states:

> "The jury was instructed as to the law on entrapment as set forth in *Notaro* v. *U.S.*, 363 F.2d 169, (1966, 9th Cir.) and *Walton* v. *U.S.*, 411 F.2d 283 (1969, 9th Cir.), and concededly here we do not have an issue of propensity, because the defendant through hearsay statements stated that he did sell speed and associated with Connolly who manufactured speed. The jury could find from the testimony that the government had not unlawfully entrapped Russell and that Russell did commit the acts as charged. There is no question that Russell committed the acts." Appellant's Brief at 7.

There was no error claimed in any instruction given or refused. The "overreaching participation" relied upon by the majority is the conduct of the government in supplying Phenyl-2-Propanone to the defendant and his fellow manufacturers. This chemical is essential to the manufacture of methamphetamine. The opinion states that it could not have been obtained had the government agent not supplied it. I would disagree with the rationale of the majority assuming its recital of facts is correct. I particularly

dissent when the facts as I read them completely fail to support the factual recitals upon which the opinion is based. The thesis is that the three individuals involved would not have been able to manufacture the product and sell it without the chemical from the government. The crimes charged occurred in early December, 1969. At one of the meetings which occurred on December 7 between the undercover agent and one of the three, the agent testified to a conversation at Russell's house:

> "He [Connolly] stated to me he had been manufacturing methamphetamine since May of 1969, that since May, up to that time, he had manufactured approximately three pounds of methamphetamine. . . ."
>
> * * *
>
> "At that time John Connolly handed me a small plastic bag containing a white powder. John Connolly stated to me 'This is the last batch that we made.'"[1]

The government did not supply any of the ingredients for this drug.

The government agent whose conduct is in question because he offered to supply Phenyl-2-Propanone in return for part of the methamphetamine, also testified:

> "THE COURT: I have a question. It was yesterday when you were testifying, Mr. Shapiro, and I am not quite sure in my own mind what

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[1] R.T. at 7-8. Patrick Connolly admitted that he had told the agent they had made three pounds since May but denied that his story was true. R.T. at 149. He also admitted that John Connolly handed the agent a sample. R.T. at 149.

you said, but did I understand you to testify that you offered to bring more Propanone, and that one of the defendants said they didn't want it, because they had their own, or something to that effect:

"THE WITNESS: That conversation took place on January 7, 1970.

"THE COURT: That they had their own?

"THE WITNESS: Yes, sir, Mr. Connolly stated that to me.

"THE COURT: Are there any other bottles of Propanone among these exhibits, except the one with the corners folded down.

"THE WITNESS: There was that one, and there was an empty bottle with a Phenyl-2-Propanone label on it, and there was a second bottle approximately half full.

"THE COURT: Of Phenyl-2-Propanone in these exhibits?

"THE WITNESS: Yes, sir."*

It is clear from this testimony that while Phenyl-2-Propanone may have been difficult to obtain, it had been obtained in the past without the assistance of the government agent. We are required in this situation to view the evidence, and all reasonable inferences therefrom, in the light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60 (1942); *United States* v. *Halprin*, No. 71-2146 (9th Cir. Oct. 20, 1971). Accepting that as true, it is correct that the appellant did use the necessary chemical supplied by the government agent on the date of manufacture for which he was convicted. It is not correct that it was impossible or even difficult for the

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*R.T. at 95-6.

defendant and his co-conspirators to obtain it from their own sources of supply. Under these circumstances it can hardly be argued that there was an "intolerable degree of governmental participation in the criminal enterprise."

Apart from my disagreement based upon the facts, I disapprove of what appears to me to be an unnecessary effort to enlarge the doctrine of entrapment beyond the limitations of the opinion of the Court in *Sherman* v. *United States*, 356 U.S. 369, and place this court among the minority who espouse the "governmental conduct" approach. *See United States* v. *Tatar*, 439 F.2d 1300, 1303 (9th Cir. 1971).

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 26485

DC # 51877-Crim.

UNITED STATES OF AMERICA, APPELLEE

v.

RICHARD RUSSELL, APPELLANT

APPEAL from the United States District Court for the Western District of Washington.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed, with directions.

Filed and entered April 6, 1972

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1585

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD RUSSELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals is reported at 459 F. 2d 671.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1972. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including June 5, 1972. The petition was filed on that date and was granted on October 16, 1972. The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether in the circumstances of this case the fact that a government agent furnished one of the means for the commission of an offense, which the defendant was concededly predisposed to commit and did commit, establishes a bar to prosecution as a matter of law.

STATEMENT

After a jury trial with co-defendant Patrick Connolly in the United States District Court for the Western District of Washington, respondent was convicted on three counts of having unlawfully manufactured and processed methamphetamine and of having unlawfully sold and delivered that drug, in violation of 21 U.S.C. (1964 ed. Supp. V) 331(q)(1), (2) and 360a(a), (b).[1] Respondent was sentenced to concurrent prison terms of two years, suspended on condition that he serve six months in jail followed by three years' probation. On appeal, the court reversed the convictions, one judge dissenting, and ordered the indictment dismissed (Pet. App. 12–21).[2] The court concluded that prosecution should be barred because of what it believed was "an intolerable degree of governmental participation in the criminal enterprise",

[1] The indictment was in five counts but only three (counts 2–4) charged respondent. Patrick Connolly was convicted on all five counts; John Connolly was named as a defendant but did not appear for trial.

[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari. "App." refers to the joint appendix in this Court; "Tr." refers to the transcript of proceedings at trial also on file with the Clerk.

involvement which it found "repugnant" (Pet. App. 14, 17).

1. The facts are not in dispute. On December 7, 1969, Agent Shapiro of the Federal Bureau of Narcotics and Dangerous Drugs, acting in an undercover capacity, met with respondent and his co-defendants, Patrick Connolly and John Connolly, at respondent's home on Whidbey Island, Washington. The purpose of Agent Shapiro's undercover mission was to locate a laboratory where he had reason to believe that methamphetamine ("speed") was being illegally produced (App. 14; Tr. 83). Shapiro told respondent and the Connollys that he represented an organization in the Pacific Northwest interested in controlling the manufacture of methamphetamine; that he wanted to purchase methamphetamine from them; and that he would supply one of the chemicals, phenyl-2-propanone, necessary to the manufacture of the drug, in return for one-half the amount of methamphetamine produced (App. 3–4; Tr. 3–6). In the course of the discussions Patrick Connolly told Shapiro that he had been manufacturing methamphetamine since May 1969 and had produced about three pounds of that drug.[4] Shapiro indicated that before he furnished any phenyl-2-propanone he wanted to see their laboratory and a sample of their methamphetamine (App. 5; Tr. 7–8). John Connolly then gave Shapiro a bag containing a

[4] Patrick Connolly admitted in his testimony that he had told Shapiro that he had manufactured three pounds of methamphetamine prior to the meetings, but he asserted that his statement had been untrue (Tr. 148–149).

quantity of methamphetamine, stating that it was from "the last batch that we made"; shortly thereafter Shapiro left with Patrick Connolly to view the laboratory which was in the latter's home on Whidbey Island. In the laboratory Shapiro saw an empty bottle labeled phenyl-2-propanone (App. 5-6; Tr. 8-9).

On the evening of December 9, 1969, Shapiro met with Patrick Connolly and respondent at the laboratory. Respondent and Connolly prepared a large flask with pieces of aluminum foil and other chemicals. At Connolly's request Shapiro provided him with a bottle containing 100 grams of phenyl-2-propanone, which Connolly added to the flask (App. 6-8; Tr. 19-22). During that night, Connolly and respondent manufactured a batch of methamphetamine (App. 7-9; Tr. 22-24).[4] The next morning Shapiro received part of the drug pursuant to their agreement and the rest was given to respondent. Shapiro later agreed to purchase some of respondent's portion of the methamphetamine for $30 (App. 10; Tr. 24, 27-31, 89-90).

On January 7, 1970, Shapiro met again with Patrick Connolly and asked if he was still interested in their "business arrangement." Connolly said that he was but that he had recently acquired two bottles of phenyl-2-propanone and would not be finished with those for a few days (App. 10-11; Tr. 33, 96). Shapiro obtained additional methamphetamine from Connolly at that time (App. 11; Tr. 33-34, 103-104). On January 10, 1970, Shapiro returned to Connolly's residence with a search warrant and seized, among other items, an

[4] Shapiro put in some pieces of foil that had fallen to the floor but did not otherwise participate in the manufacturing process or direct the work (App. 12; Tr. 71-72, 87).

empty 500 gram bottle of phenyl-2-propanone and a 100 gram bottle partially filled with that substance (App. 11–12; Tr. 35, 45–46, 50, 95–96). The 100 gram bottle was not the one previously supplied by Agent Shapiro (App. 12; Tr. 50).

Agent Shapiro testified on cross-examination that a number of chemical supply firms had voluntarily ceased selling phenyl-2-propanone at the request of the Federal Bureau of Narcotics and Dangerous Drugs. The chemical may, therefore, have been generally difficult to obtain around December 9, 1969 (App. 14; Tr. 82), although there were no legal restrictions on its manufacture and sale. Both Shapiro and a government chemist testified that phenyl-2-propanone is an essential ingredient in the method used by respondent and Connolly to manufacture methamphetamine (App. 15; Tr. 84–85, 112–113).

At his trial for manufacturing, processing, possessing, and selling a controlled drug, respondent did not testify or introduce any evidence. He made motions for acquittal, which were denied, based on a claim of entrapment stemming from Agent Shapiro's participation in the offense (Tr. 114–118, 161). On appeal respondent acknowledged that the jury had been properly instructed on the defense of entrapment[3] and that

[3] The district judge gave the Ninth Circuit's approved instruction on entrapment, which admonished the jury to acquit if under the evidence it had a "reasonable doubt whether the defendant had the previous intent or purpose to commit the offense * * * and did so only because he was induced or persuaded by some officer or agent of the government" (App. 17–18; Tr. 170–180).

> * * * concededly, here we do not have an issue of propensity, because the defendant through hearsay statements stated that he did sell speed and associated with Connolly who manufactured speed. The jury could find from the testimony that the government had not unlawfully entrapped Russell and that Russell did commit the acts as charged. There is no question that Russell committed the acts. [Pet. App. 18 quoting Brief p. 7.]

2. Even though respondent had concededly harbored a predisposition to commit the offense, and thus the jury properly refused to accept his entrapment defense as it has been defined in the decisions of this Court, the court of appeals reversed respondent's conviction and ordered the indictment dismissed. The court held that the conduct of the federal undercover agent in supplying an ingredient needed to manufacture the illicit drug constituted "an intolerable degree of governmental participation in the criminal enterprise" (Pet. App. 14), and that its determination to this effect barred prosecution. The determination was apparently based upon the factual assumption that "there could not have been the manufacture, delivery, or sale of the illicit drug had it not been for the Government's supply of one of the essential ingredients" (Pet. App. 13) and that respondent "would have been powerless to 'commit' the charged offense without the Government's pervasive intervention" (Pet. App. 15).

The majority opinion initially suggested "two theories" under which this holding could be justified: (1) "Placing the defense within the ambit of the en-

trapment doctrine" as it had been enlarged by two other lower courts (Pet. App. 14) or (2) creating a new defense based on the degree to which the government becomes "enmeshed in criminal activity" and allegedly resting on "the same underlying objections which render entrapment repugnant to American criminal justice" (Pet. App. 16, quoting from *Greene v. United States*, 454 F.2d 783, 787 (C.A. 9)). After discussing the two theories, the court of appeals concluded that "the only difference * * * is the label affixed to the result" (Pet. App. 17):

> Both theories are premised on fundamental concepts of due process and evince the reluctance of the judiciary to countenance "over zealous law enforcement." We do not choose to affix a label to our result; hence, we need not select between the alternative theories. Here, both compel the same disposition. [Footnote omitted.]

Judge Trask, dissenting, disapproved of the majority's "unnecessary effort to enlarge the doctrine of entrapment beyond the limitations of * * * *Sherman v. United States*, 356 U.S. 369" (Pet. App. 21); he also emphasized that the majority's factual assumptions were not supported by the record, since respondent had obtained phenyl-2-propanone for the manufacture of methamphetamine from sources of his own both before and after being supplied with that ingredient by Agent Shapiro (Pet. App. 19–21).

SUMMARY OF ARGUMENT

In *Sorrells* v. *United States*, 287 U.S. 435, 441, this Court took note of the "well settled * * * [rule] * * * that the fact that officers or employees of the Govern-

ment merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." The Court also expressly approved the use of "[a]rtifice and stratagem" to catch those engaged in criminal conduct, stating that the "appropriate object of the permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law." The principal limitation on the "permitted activity," inherent in the policy considerations which justify the use of "artifice and stratagem," is that the government officials not "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute" (287 U.S. at 442).

Respondent here was conspiring with several other persons who were engaged in the production and sale of an illicit drug. It was conceded in the court below that he was not an "innocent person" beguiled into criminal activity, and that his predisposition to commit the offense was not in issue in the case. Moreover, it was likewise conceded that "the jury could find from the testimony that the government had not unlawfully entrapped [respondent]" (Pet. App. 18).

The court of appeals erred in holding that respondent's conviction for the manufacture and sale of an illicit drug could not be sustained because an undercover agent—seeking "to expose * * * illicit [drug]

traffic"—provided a chemical used in the production of the drug which respondent and his accomplices had manufactured. The court reached this conclusion in the face of a record which clearly established that both prior to and after their association with the undercover agent here, respondent and his accomplices manufactured the drug using the same chemical ingredient obtained from other sources.

The holding of the court of appeals, despite the claim in its opinion, is wholly inconsistent with the well settled principles established by this Court and finds no support in the basic considerations underlying the entrapment defense: that law enforcement officers not play on "the weakness of an innocent party and beguile him into committing crimes which he would not otherwise have attempted." *Sherman* v. *United States*, 356 U.S. 369, 376.

The conclusion of the court of appeals that the conduct of the undercover agent constituted a violation of "fundamental concepts of due process", independent of an entrapment defense, is at odds with decisions of this Court defining appropriate police investigative activity. These cases recognize that, consistent with accepted notions of fairness, a person may be prosecuted for engaging in particular criminal activity, despite government inducement or solicitation, if that action is appropriate to the detection of criminal activity and if the offense for which he is prosecuted is essentially a substitute for a similar criminal act which would have been committed without government participation.

Applying these accepted principles here it is plain that the undercover agent's activity did not violate due process. The holding of the majority to the contrary establishes an arbitrary exception to the well settled rule based on a single isolated fact having nothing whatever to do with objections underlying participation by undercover agents in criminal activity or accepted notions of fairness. This arbitrary and unreasonable exception should be rejected by this Court.

ARGUMENT

THE ACTIVITY OF THE GOVERNMENT AGENT IN THIS CASE DID NOT CONSTITUTE ENTRAPMENT OR DENY RESPONDENT DUE PROCESS

Despite the fact that respondent admittedly "harbored a predisposition to commit the charged offenses" (Pet. App. 13), that there was no substantial government inducement to commit the offense, and that petitioner was engaged in the illicit manufacture of these drugs both before and after the commission of the offense charged here, the majority below reversed the conviction. The touchstone of its decision was that the government supplied one of the essential ingredients of the illicit drug and that without that ingredient, "there could not have been the manufacture, delivery or sale of the illicit drug * * *" (Pet. App. 13).

This approach of the court below is, we submit, wholly at odds with the underlying nature of the entrapment defense as expressed in prior decisions of this Court. In the light of those decisions, the conduct of the undercover agent in this case was not entrap-

ment. Rather it was quite proper and within the scope of investigatory practices recognized by this Court as "necessary weapons in the arsenal of the police officer." *Sherman* v. *United States*, 356 U.S. 369, 372. The alternative due process theory upon which the decision below is said to rest is likewise untenable. On one level it is simply a way of avoiding the established doctrine of entrapment developed by this Court. On another level it introduces an ambiguous and vague standard for testing the validity of governmental investigative conduct. The terms "intolerable" and "repugnant" when used to characterize government investigative activity are not susceptible to ready application in the course of legitimate undercover work. While there might be rare cases to which the due process clause would apply, the adoption of the vague test enunciated below can only inhibit legitimate undercover activity.[6]

A. THE DECISION BELOW IS INCONSISTENT WITH ANY VIEW HERETOFORE RECOGNIZED BY THIS COURT AS TO THE NATURE OF THE DEFENSE OF ENTRAPMENT AND SHOULD NOT BE ADOPTED

1. This Court has dealt with the defense of entrapment infrequently.[7] The Court first recognized the

[6] The court of appeals treated these inquiries as a question of law, which it resolved finally itself, reversing the conviction with directions to dismiss the indictment. Its decision is therefore objectionable on the additional ground that it formulated and applied a value-judgment standard that a jury has never been given an opportunity to consider. See note 12, *infra*.

[7] The history of the entrapment defense is traced in DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U. San Fran. L. Rev. 243, 244–252 (1967).

defense in 1932 in *Sorrells* v. *United States*, 287 U.S. 435, a prosecution under the National Prohibition Act for selling whiskey to an undercover federal agent. The evidence as summarized in the majority opinion of Chief Justice Hughes was deemed "sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation." 287 U.S. at 441. The question before the Court was whether, on these facts, the rulings of the courts below that there was *no* entrapment as a matter of law were correct. Eight justices of this Court thought the rulings erroneous[1] but divided sharply over the nature of the entrapment defense. Chief Justice Hughes, writing for five members of the Court, held that the doctrine of entrapment was predicated on the view that Congress could not have intended that the "processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons *otherwise innocent* in order to lure them to its commission and to punish them." 287 U.S. at 448 (emphasis added). The Court noted favorably the well established principle that (287 U.S. at 441) "the fact that officers or employees of the Government merely af-

[1] Justice McReynolds alone indicated that he would have affirmed the conviction. 287 U.S. at 453.

ford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises." It stated, however, that (287 U.S. at 442): "A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an *innocent* person the disposition to commit the alleged offense and induce its commission in order that they may prosecute" (emphasis added).

The opinion of the majority further stated (287 U.S. at 451):

> [T]he defense of entrapment is not simply that the particular act was committed at the instance of government officials. That is often the case where the proper action of these officials leads to the revelation of criminal enterprises. [Citation omitted]. The predisposition and criminal design of the defendant are relevant. *But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials.* If that is the fact, common justice requires that the accused be permitted to prove it. The Government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused, and if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. * * * [emphasis added].

The Chief Justice's opinion thus left no doubt that the defense of entrapment which the Court was then recognizing was not primarily focused on the propriety of the conduct of government agents but rather was directed to the issue of the subjective guilt of the defendant and as such involved an inquiry into his predisposition to commit the offense. That is, the entrapment defense was not viewed as a way of punishing the government for improper conduct by exonerating an "otherwise guilty" person.[9]

This Court next dealt with the entrapment defense in *Sherman* v. *United States*, 356 U.S. 369, which involved a conviction for selling narcotics to a government informer. All nine justices agreed that, on the evidence,[10] entrapment was established as a matter of law. The Court, however, divided once again over the

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[9] The concurring opinion of Mr. Justice Roberts for three members of the Court approached the issue somewhat differently. He contended that the basis for an entrapment defense should be a rule of "public policy" based upon the purity of the judicial process rather than upon imputed congressional intent. He emphasized, to a greater degree, the concern about improper governmental conduct and indicated that the rationale for the defense ought not to be the innocence of the defendant but "the inherent right of the court not to be made the instrument of wrong." The opinion concluded that where inducement or instigation by the government was shown, the prosecution should not be permitted in rebuttal to introduce evidence of the defendant's predisposition. See 287 U.S. at 453–459.

This difference in approach also resulted in a disagreement between the concurring justices and the majority as to who (court or jury) should determine whether entrapment is established, and whether it should make any difference what type of crime is involved. See 287 U.S. at 455, 457–458.

[10] The facts as detailed in Chief Justice Warren's opinion for the Court showed that the informer met the defendant at a doctor's office where both were receiving treatment to be cured of

elements of the entrapment defense. The Chief Justice, writing for the majority, held that reversal was required under the rationale of the majority in *Sorrells*, which it adopted and summarized as follows (356 U.S. at 372-373):

> In *Sorrells* v. *United States*, 287 U.S. 435, this Court firmly recognized the defense of entrapment in the federal courts. The intervening years have in no way detracted from the principles underlying that decision. The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, "A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." 287 U.S., at 442. Then stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. Congress could not have intended that

narcotics addiction. After several such accidental meetings, the informer asked the defendant if he knew of a source of narcotics since he (the informer) was not responding to treatment. The defendant attempted to avoid the issue but "after a number of repetitions of the request, predicated upon [the informer's] presumed suffering," he acquiesced. Thereafter he purchased narcotics on several occasions from the source and shared them with the informer, collecting from the informer a portion of the purchase price. The informer ultimately reported the defendant's activities to federal agents, who then observed sales of narcotics by the defendant to the informer. 356 U.S. at 371.

its statutes were to be enforced by tempting innocent persons into violations.

However, the fact that government agents "merely afford opportunities or facilities for the commission of the offense does not" constitute entrapment. Entrapment occurs only when the criminal conduct was "the product of the *creative* activity" of law-enforcement officials. [Emphasis in original.] See 287 U.S., at 441, 451. To determine whether entrapment has been established, *a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.* [Emphasis added.] The principles by which the courts are to make this determination were outlined in *Sorrells*. On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an "appropriate and searching inquiry into his own conduct and predisposition" as bearing on his claim of innocence. See 287 U.S., at 451.

The Court thus adhered to the majority view in *Sorrells* that the entrapment doctrine rests on a claim of subjective innocence which may be undermined by proof of the defendant's predisposition to commit the crime notwithstanding the government's instigation or persuasion.[11] Moreover, the Court rejected the sugges-

[11] The majority also discussed the effect of the government's evidence of the defendant's two previous narcotics convictions, offered to prove his "readiness" to sell narcotics to the informer. While deeming the attempt to show the defendant's predisposition relevant, the majority found the evidence insufficient to "prove [defendant] had a readiness to sell narcotics at the time [the informer] approached him" in light of the other evidence introduced on this issue, and the fact that the convictions occurred many years before the events in question. 356 U.S. at 375–376.

tion in Mr. Justice Frankfurter's concurring opinion that it "reassess the doctrine of entrapment according to principles announced in the separate opinion of Mr. Justice Roberts in *Sorrells* v. *United States*, 287 U.S. 435, 453." 356 U.S. at 376. The Court stated in this regard (356 U.S. 376–377):

> * * * Mr. Justice Roberts asserted that although the defendant could claim that the Government had induced him to commit the crime, the Government could not reply by showing that the defendant's criminal conduct was due to his own readiness and not to the persuasion of government agents. The handicap thus placed on the prosecution is obvious. * * *

In this regard, the Court quoted (356 U.S. at 377 n. 7) from Judge Learned Hand's opinion in earlier proceedings in the case:

> "Indeed, it would seem probable that, if there were no reply [to the claim of inducement], it would be impossible ever to secure convictions of any offences which consist of transactions that are carried on in secret." *United States* v. *Sherman*, 200 F. 2d 880, 882."

In two subsequent cases involving an entrapment claim, the Court found it unnecessary to reexamine the question disputed in *Sorrells* and *Sherman* as to the appropriate doctrinal foundation for the entrap-

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"The Court in *Sherman* also specifically reaffirmed the holding in *Sorrells* "that unless it can be decided as a matter of law, the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused." 356 U.S. at 377. In *Masciale* v. *United States*, 356 U.S. 386, decided the same day as *Sherman*, the Court, dividing as in *Sherman*, held that since the testimony on entrapment was conflicting, the issue was properly submitted to the jury.

ment defense. In *Osborn* v. *United States*, 385 U.S. 323, a prosecution for endeavoring to bribe a member of the jury panel in a prospective criminal trial, this Court rejected a contention that entrapment had been established as a matter of law under *Sherman* and *Sorrells*, stating (385 U.S. at 331–332):

> Surely it was not a "trap for the unwary innocent," *Sherman* v. *United States*, 356 U.S. 369, 372, for Vick [an informer] to tell the petitioner, truthfully, that he knew some of the members of the jury panel and that one of them was his cousin [Elliot]. And according to Vick he had said no more when the petitioner "jumped up," went out into the alley with him and initiated the effort to get Elliott "on our side." At the most, Vick's statement afforded the petitioner "opportunities or facilities" for the commission of a criminal offense, and that is a far cry from entrapment. *Sherman* v. *United States*, *supra*, at 372; *Sorrells* v. *United States*, 287 U.S. 435, 441 [footnote omitted].

See, also *Lopez* v. *United States*, 373 U.S. 427, 434, where the Court found that "under any approach," the defendant's claim of entrapment was insubstantial.

2. We have set out the entrapment rationale developed by this Court in some detail to emphasize the fundamental differences between the principles underlying the entrapment defense and the holding of the court below.[18]

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[18] A recent decision of the same court marks a further departure from the established rationale of the entrapment defense. In *United States* v. *Knight*, No. 72-2081, decided October 16, 1972, heroin had passed from an illegal source, through an informer who acted merely as a conduit, to the defendant and then to his accomplice. The court of appeals affirmed a district court order suppressing the heroin on the ground that probable cause to arrest

The court of appeals recognized that it was departing from the established standards and purported to rely on the concurring opinion of Mr. Justice Frankfurter in *Sherman*. But that opinion, whatever its precedential value in view of the majority's refusal to reconsider the basis of the entrapment defense, lends no support to the test adopted here. While it is true that Mr. Justice Frankfurter, like Mr. Justice Roberts in *Sorrells*, advocated an entrapment defense predicated on the nature of police conduct, he emphasized that (356 U.S. 383–384):

> This does not mean that the police may not act so as to detect those engaged in criminal conduct and ready and willing to commit further crimes should the occasion arise. Such indeed is their obligation. It does mean that in holding out inducements they should act in such a manner as is likely to induce to the commission of crime only these persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations. This test shifts attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime. * * * [13]

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and search the accomplice could not be based on her possession of the heroin which had passed through the informer.

[13] We question whether it is a proper exercise of the judicial function to create a substantive immunity from punishment for conduct proscribed by Congress. Ratner, *The Functions of the Due Process Clause*, 116 U. Pa. L. Rev. 1048, 1063–1068 (1968). The traditional entrapment defense is based on the reasonable assumption that Congress did not intend the "otherwise innocent" to be punished for being impelled by the government to commit generally forbidden acts. But there is no basis in fact or theory for

Plainly on the facts here, the undercover agent acted only to "detect those engaged in criminal conduct" who were "ready and willing to commit further crime should the occasion arise." The undercover agent merely told respondent and his co-defendants

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assuming that the legislature implicitly intends that those "otherwise predisposed to crime" should receive immunity for actual violations of criminal statutes simply to punish an investigator for engaging in conduct "likely" to have tempted a law-abiding citizen.

The objective test formulated by Justice Roberts in *Sorrells* and by Justice Frankfurter in *Sherman* is similar to that suggested in the Proposed New Federal Criminal Code (1971), Final Report of the National Commission on Reform of Federal Criminal Laws. Section 702 of the Commission's suggested code defines entrapment as occurring "when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment. The Model Penal Code's formulation is comparable. Section 2.10, Model Penal Code (Tent. Draft No. 9, 1959); Section 2.13, Model Penal Code (Proposed Official Draft, 1962).

There are substantial reasons why it would be unwise as a matter of policy to shift the focus of the entrapment defense from the subjective criminal intent of the accused to the objective tendency of the investigator's conduct. For instance, it does not seem either practical or just to award immunity to a defendant simply because the conduct of the investigator was likely to have caused an innocent person to commit an offense if in fact the investigation involved a person otherwise disposed toward the offense and merely awaiting an opportunity to commit it. Such a rule would seem to confer a wholly gratuitous benefit. Even the exclusionary rule under the Fourth Amendment, which has been criticized as "letting the guilty go free" because "the constable blundered," is designed in part to redress the violation of the *personal* rights of the accused. It has not been considered appropriate to promote the deterrent purpose of that rule by expanding its application to persons whose legitimate interests were *not* in fact violated. See *Alderman* v. *United States*, 394 U.S. 164, 174–175. The present formulation of the entrapment defense, we submit, strikes the proper bal-

that he wished to purchase methamphetamine from them and that he would supply some phenyl-2-propanone, one of the chemicals needed to manufacture the drug, in return for half the methamphetamine produced. This is a "far cry" (*Osborn* v. *United States*, *supra*) from entrapment, since the agent's offer was not likely to induce the commission of crime by persons "who would normally avoid crime and * * * resist ordinary temptations." *Sherman* v. *United States*, *supra*, 356 U.S. at 384 (Mr. Justice Frankfurter concurring).[14]

3. The majority below apparently sought to bring the result here within the scope of this Court's decisions by citing the statement, first appearing in *Sorrells* and later reiterated in *Sherman*, that entrapment occurs when the criminal conduct is the product of the "creative activity" of law enforcement officials. See *Sherman* v. *United States*, *supra*, 356 U.S. at 372. But it is clear that in using the quoted phrase, as well as the phrase "manufacturing of crime" in *Lopez*, *supra*, the Court was not referring to the practice found offensive here of furnishing means for the commission of the offense, but rather to the concept of inducement by the government of the "unwary innocent." The Court's opinions in the entrapment field

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since: it discourages government overreaching by justifying an acquittal whenever there is a reasonable possibility that the defendant on trial may have been an otherwise innocent man induced by the government, but the present formulation does not immunize those who were not in fact seduced from innocence.

[14] Likewise neither the American Law Institute's Model Penal Code nor the Proposed New Federal Criminal Code purport to create an entrapment defense where such inducement is lacking. See note 13, *supra*.

cannot be read as encompassing the possibility of a different defense, to which inducement is irrelevant, based solely on the furnishing of means for the commission of the offense by an undercover agent to persons predisposed and willing to commit it. To the contrary, this Court unequivocally foreclosed the assertion of any such "defense" by emphasizing that where a criminal predisposition is found to exist, "the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." *Sorrells* v. *United States, supra,* 287 U.S. at 441; *Sherman* v. *United States, supra,* 356 U.S. at 372.

It is true that in neither *Sorrells* nor *Sherman* was this Court presented with a factual pattern precisely like the one in this case. But no substantial reasons are suggested for departing here from the principles enunciated in those cases. The "underlying objections which render entrapment repugnant to American criminal justice," on which the majority purported to rely (Pet. App. 16), derive from "a spontaneous moral revulsion against using the powers of government to beguile innocent, though ductile, persons into lapses which they might otherwise reject." See *United States* v. *Becker,* 62 F. 2d 1007, 1009 (C.A. 2) (L. Hand, J.). As Chief Justice Warren stated in *Sherman,* the defense of entrapment is intended to curtail "[l]aw enforcement * * * methods" which play "on the weaknesses of an innocent party and beguile him into committing crimes which he otherwise would not have attempted" (356 U.S. at 376). The conduct of the undercover agent here in no way offended these policies.

Moreover, the two courts of appeals decisions relied upon by the majority, *United States* v. *Bueno*, 447 F. 2d 903 (C.A. 5), and *Greene* v. *United States*, 454 F. 2d 783 (C.A. 9), are factually distinguishable from the present case. While we believe both to have been wrongly decided under the majority opinion in *Sherman* and *Sorrells*, they involve a degree of government participation and inducement far in excess of that present here. In *Bueno* an informer purchased heroin, shared it with the defendant who was a drug addict, repeatedly asked him to attempt a sale of the heroin which the informer was to provide, and apparently arranged for a sale to an undercover agent. On these facts, the court concluded that the defendant had been entrapped as a matter of law.

The Ninth Circuit's earlier decision in *Greene*, *supra*, likewise involved a case of extensive government involvement including the construction of an illegal still and its operation over a prolonged period of time, and accompanied by overbearing inducement and veiled threats of physical injury. A divided court of appeals held that because of this activity the conviction could not be sustained. But the court was careful to note that "the Government through its [undercover agent] did not simply attach itself to an ongoing bootlegging operation for the purpose of closing it down and prosecuting the operators. * * * [R]ather the procedure followed by the [undercover agent] * * * helped first to reestablish, and then to sustain, criminal operations which had ceased * * *" (454 F. 2d at 787).

Those cases bear little relation to the facts in the present case, where on the basis of prior leads, the government through its undercover agent attached itself briefly to what the record indicated was an "on-going" illicit drug laboratory "for the purpose of closing it down and prosecuting its operators." [15] Compare *Sorrells* v. *United States*, 4 F. 2d 87 (C.A. 6).

6. It is thus plain that the new entrapment defense adopted by the court below is in reality nothing more than an arbitrary exception to the well settled rule that furnishing "opportunites and facilities" for the commission of crime is "appropriate" and often "essential" to the detection of those engaging in that activity. *Sorrells* v. *United States*, *supra*, 287 U.S. at 441-442. The furnishing of "opportunities and facilities" that aid in the conduct of a criminal enterprise is a traditional and indispensable tactic for conducting undercover investigations. It is frequently necessary for the undercover agent to furnish such aid in order to convince the suspects that he is a genuine partici-

[15] A third case relied upon by the court below was a district court decision which held that a defendant who approached a notorious counterfeiter and asked to purchase counterfeit money for resale could not be prosecuted for possession of counterfeit bills, where after the approach was made, the counterfeiter reported it to the Secret Service, which provided the counterfeit bills through an undercover agent to whom the counterfeiter had introduced the defendant. *United States* v. *Chisum*, 312 F. Supp. 1207 (C.D. Cal.). Cf. *People* v. *Strong*, 21 Ill. 2d 290, 172 N.E. 2d 765; *United States* v. *Dillet*, 265 F. Supp. 280 (S.D.N.Y.). We submit that *Chisum* was wrongly decided for many of the same reasons that warrant reversal of the judgment below. We have filed a petition for a writ of certiorari in *United States* v. *McGrath*, No. 72-761, filed November 22, 1972, seeking review of a decision by the Seventh Circuit reaching a conclusion similar to that in *Chisum*.

pant. Other investigations, particularly in drug cases, depend on probing leads about criminal activity by offering to purchase contraband and sometimes supplying the financing with which a seller obtains the drugs from his supplier. In other cases, in pursuing the investigation to its fruition, an undercover agent must furnish money to buy tools needed in the crime, or provide a car, or allow the use of his premises to plan the crime. See, *e.g.*, *Johnson* v. *United States*, 317 F. 2d 127 (C.A.D.C.); cf. *United States* v. *Roett*, 172 F. 2d 379 (C.A. 3), certiorari denied, 336 U.S. 960. Yet there is no difference, in terms of the entrapment rationale adopted by this Court, between the furnishing of such assistance and the supplying of one of the components of the illicit drug in this case. Such governmental conduct is not crime-creating in the only sense condemned in *Sorrells* and *Sherman*, *i.e.*, creating the disposition in innocent persons to commit the offense.[14]

B. THERE WAS NO VIOLATION OF DUE PROCESS IN THIS CASE

Without detailed exposition, the court below also held that the law enforcement activity in this case violated governing standards of due process.

The decision voiding respondent's conviction on due process grounds appears to rest on the statement by the court of appeals that an indictment returned after an "intolerable degree of government participa-

[14] See generally Rotenberg, *The Police Detection Practice of Encouragement*, 49 Va. L. Rev. 871, 873–874, 876 (1963), explaining some of the circumstances in which methods of investigation and detection other than "encouragement" are "simply inadequate."

tion in the criminal enterprise" contravenes "fundamental concepts of due process". In this case, the court also termed the agent's conduct "repugnant" (Pet. App. 17). The majority opinion is not altogether clear as to the basis upon which it concluded that the degree of government participation here was "intolerable": although the majority held that respondent "would have been powerless to 'commit' the charged offense without the Government's pervasive intervention" (Pet. App. 15), the opinion appears to acknowledge that the chemical supplied by the undercover agent could have been obtained independently, albeit possibly with some "difficulty", through legitimate channels (Pet. App. 13).[16]

Moreover, the court made no real effort to reconcile its holding—freeing a person who was concededly engaged in the production and sale of illicit drugs both before and after the agent's "intervention"—with the well established principle, discussed above, permitting government participation for the purpose of detecting on-going criminal activity. Although the majority purported to find support for its position in the concurring opinion of Justice Frankfurter in *Sherman* that opinion, as we have already shown, lends no support to the result reached here.[17]

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[16] The difficulty in obtaining the chemical from legitimate sources was not due any legal restrictions on the manufacture and sale of phenyl-2-propanone—in fact there were none, but because the Bureau of Narcotics and Dangerous Drugs had succeeded in persuading a member of chemical supply firms to cease selling the drug (App. 14; Tr. 87).

[17] *Raley* v. *Ohio*, 360 U.S. 423, cited by the majority below is inapposite. That case involved governmental advice to wit-

We do not here challenge the proposition that under certain circumstances government participation in a criminal venture might reach a level of direction and control that would make it a violation of the due process clause to prosecute the people who acquiesce in what would be essentially the government's enterprise. We submit, however, that a determination of the circumstances under which such conduct is found to violate the due process clause cannot be made in a vacuum, but must be made in the context of "accepted notions of justice." See *Malinski* v. *New York*, 324 U.S. 401, 416–417 (Frankfurter, J., concurring). See also *Rochin* v. *California*, 342 U.S. 165, 170–171. Viewing the conduct of the undercover agent here in this light, it is plain that the isolated fact upon which the majority appeared to rest its holding—the supplying of the phenyl-2-propanone—does not justify the holding that the respondents' conviction offends "fundamental concepts of due process."

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nesses that they were entitled to refuse to answer questions under the privilege against self-incrimination, followed by prosecution for their failure to answer because the privilege was not available. The Court held it a denial of due process to convict a witness who justifiably relied on advice by government officials that he was constitutionally privileged to remain silent. The basis for the defense in *Raley*, with which we have no quarrel, is that an individual must have fair notice of what conduct will render him subject to criminal prosecution. See Note, *Applying Estoppel Principles in Criminal Cases*, 78 Yale L.J. 1046 (1969); Orfield, *The Defense of Entrapment in the Federal Courts*, 1967 Duke L.J. 39, 53–54; see also *Cox* v. *Louisiana*, 379 U.S. 559, 569–571. *Raley* and the line of decisions which derive from it hence have little relevance to the defense created here which purportedly rests upon misuse by a government agent of an undercover role.

1. Although the "various protections of the Bill of Rights * * * provide checks upon * * * official deception" (*Lewis* v. *United States*, 385 U.S. 206, 209), this Court has never intimated that the kind of conduct engaged in by the undercover agent in this case overstepped constitutional bounds. Compare *Masvial* v. *United States*, 377 U.S. 201. Indeed this Court has found no constitutional violation arising out of the use of undercover agents and stratagems no less calculated and immediate than the agent's tactic in this case.

In *Lewis* v. *United States*, *supra*, for example, the Court sustained a conviction for selling marihuana where the sale was made to an undercover agent who initiated the transaction by telephoning the defendant and asking to be supplied with marihuana. See also *Osborn* v. *United States*, 385 U.S. 323.[18] These cases illustrate that this Court has never applied a "but

[18] In a decoy letter case, *Grimm* v. *United States*, 156 U.S. 604, 609–610, this Court held that it was no defense to a prosecution for mailing obscene material that the government had caused the mailing by sending the defendant a letter under an assumed name asking for a supply of obscene photographs. The court stated (156 U.S. at 610): "The official, suspecting that the defendant was engaged in a business offensive to good morals, sought information directly from him, and the defendant, responding thereto, violated a law of the United States by using the mails to convey such information, and he cannot plead in defence that he would not have violated the law if inquiry had not been made by such government official." See also *Andrews* v. *United States*, 162 U.S. 420.

Mr. Justice Frankfurter in his concurring opinion in *Sherman*, 356 U.S. 382, cited *Grimm* approvingly with the comment that it is "perfectly clear" that the police may "simply furnish the opportunity for the commission of the crime * * *"

for" test in determining the permissible extent of participation by law enforcement agents in the crime. Certainly, it has not been considered improper or unfair to prosecute an offender for a crime, on the ground that he would not have committed that *particular* crime had not the undercover agent been involved. What suffices to make such a person the fair object of prosecution is, in the words of Justice Frankfurter, his "general intention or predisposition to commit, whenever the opportunity should arise, crimes of the kind solicited * * *." *Sherman* v. *United States, supra,* 356 U.S. at 382; see, also, *Trent* v. *United States,* 284 F. 2d 286, 288, n. 2 (C.A.D.C.) (Burger, J.). Thus this Court has allowed ample leeway for undercover agents to play their investigative roles and has not disturbed convictions based on the claim that the crime would not have been committed in the absence of governmental participation.

These results are but particularized applications of the settled notion that, "in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents." *Lewis* v. *United States,* 385 U.S. 206, 208–209, and cases cited; see also *Sherman* v. *United States, supra,* 356 U.S. 372. This Court has recognized that "artifice and stratagem" are "frequently essential to the enforcement of the law." *Sorrells* v. *United States, supra,* 287 U.S. at 441–442. Courts and commentators have particularly observed that drug offenses are a "prime example" of the kind of crimes suitable for undercover activity since they are "committed in secret under such circumstances that perpetration might never be dis-

covered if government representatives were not permitted to participate to some extent." *Whiting* v. *United States*, 321 F. 2d 72, 76 (C.A. 1), certiorari denied, 375 U.S. 884.

The decisions in *Sorrells* and *Sherman*, of course, define the limits of permissible government participation. Together with the holdings discussed above, they recognize that punishment may be imposed for particular criminal activity, despite government inducement or solicitation, provided such action is appropriate in the detection of criminal activity and that the suspect was not an otherwise innocent citizen not disposed toward committing the crime until seduced by government action. See generally Note, *The Serpent Beguiled Me And I Did Eat—The Constitutional Status of the Entrapment Defense*, 74 Yale L. J. 942, 949 (1965)."

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[19] The opinions of the court of appeals have been unanimous in holding that in these circumstances government participation does not offend due process. Collateral attacks by state and federal prisoners have, therefore, been denied when based on the defense of entrapment. See, *e.g.*, *United States ex rel. Hall* v. *Illinois*, 329 F. 2d 354 (C.A. 7), certiorari denied, 379 U.S. 891; *Simmons* v. *United States*, 302 F. 2d 71 (C.A. 8); *Turner* v. *United States*, 262 F. 2d 643 (C.A. 8); *Way* v. *United States*, 276 F. 2d 912 (C.A. 10); *Benson* v. *Carter*, 396 F. 2d 319 (C.A. 9). Compare *Banks* v. *United States*, 249 F. 2d 672 (C.A. 9), with *Banks* v. *United States*, 258 F. 2d 318, 319 (C.A. 9), certiorari denied, 358 U.S. 886. See, also, *LeDent* v. *Wolff*, 334 F. Supp. 64 (D. Neb.); *State* v. *Kasai*, 27 Utah 2d 326, 495 P. 2d 1265, 1267; *People* v. *Washington*, 81 Ill. App. 2d 162, 165, n. 1, 225 N.E. 2d 673, 674, n. 1; *People* v. *Sinclair*, 30 Mich. App. 473, 186 N.W. 2d 767, 771, reversed on other grounds, 387 Mich. 91, 194 N.W. 2d 878; *Hawthorne* v. *State*, 43 Wis. 2d 82, 93, 168 N.W. 2d 85, 91.

Applying these "accepted notions of justice" here, the undercover agent's activity was consistent with the requirements of fundamental fairness.

The undercover agent testified that his purpose in the investigation was to locate the laboratory where the illicit drug was being made (App. 14; Tr. 83). To do so the agent could not operate in the posture of a mere arms-length purchaser but had to infiltrate the group itself; his decision to accomplish this by offering to supply one of the chemical ingredients cannot be said to have been inappropriate to achieve his legitimate objective. The undercover agent did not threaten, cajole, or importune respondent and his confederates to induce them to manufacture a dangerous drug they were not otherwise reading and willing to produce. Moreover, as indicated in the statement, aside from supplying some phenyl-2-propanone, the undercover agent lent no aid to respondent's illegal venture. Respondent and his co-defendants provided the other ingredients, the labor, and the equipment needed to produce the methamphetamine. The finding of the majority that respondent "would have been powerless to 'commit' the offense without the Government's pervasive intervention," apparently based on its belief that the chemical could not otherwise have been obtained, is contrary to the record which clearly established that respondent and his cohorts were able to obtain the phenyl-2-propanone independently both before and after the agent's "inter-

vention". (See *supra*, pp. 2-5). As Judge Trask wrote in his dissenting opinion:

> It is clear from this testimony that while Phenyl-2-Propanone may have been difficult to obtain, it had been obtained in the past without the assistance of the government agent. We are required in this situation to view the evidence, and all reasonable inferences therefrom, in the light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60 (1942); *United States* v. *Halprin*, No. 71-2146 (9th Cir. Oct. 20, 1971). Accepting that as true, it is correct that the appellant did use the necessary chemical supplied by the government agent on the date of manufacture for which he was convicted. It is not correct that it was impossible or even difficult for the defendant and his co-conspirators to obtain it from their own sources of supply. Under these circumstances it can hardly be argued that there was an "intolerable degree of governmental participation in the criminal enterprise."

It may be that due process precludes criminal conviction for engaging in conduct that would not have been possible without the participation and assistance of a government agent who supplied an indispensable means to the commission of the crime that could not have been obtained otherwise, through legal or illegal channels. But that is not what the record in this case establishes. Insofar as the court of appeals was applying a different standard in barring prosecution following "overzealous law enforcement" that it considered "repugnant", the decision lacks a

basis in fact here, finds no authority in prior decisions, and erects unwarranted barriers to effective and legitimate law enforcement. The conduct of agent Shapiro in this case was well within the bounds of official action approved by this Court in a variety of contexts, and there was no valid ground for overturning the jury's determination that respondent had engaged in culpable criminal conduct.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the judgment of conviction reinstated.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1585

UNITED STATES OF AMERICA,

Petitioner,

—against—

RICHARD RUSSELL,

Respondent.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AND NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE, *AMICI CURIAE*

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In the

Supreme Court of the United States

October Term, 1972

No. 71-1585

United States of America,

Petitioner,

—against—

Richard Russell,

Respondent.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AND NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE, *AMICI CURIAE*

Interest of *Amici*

The American Civil Liberties Union and the National Emergency Civil Liberties Committee have a long-standing interest in protecting the right of defendants in criminal prosecutions to be free from denial of due process of law and, to be protected against being drawn into criminal activities by government agents bent on securing convictions.

The case at bar draws into question the propriety of the government supplying the contraband upon which a prosecution is based. The question is a complex one, and we believe that our brief will be of substantial assistance to the Court.

Letters consenting to the filing of this brief have been filed with the Clerk.

Question Presented

Is it a defense to a crime of trade in contraband that the government has supplied the contraband or an indispensable element of the contraband?

Statement of the Case

The essential facts of this case are set forth in the majority opinion of the court below. 459 F.2d 671 (9th Cir. 1972).

Summary of the Argument

I. The history of the entrapment defense in this and other courts discloses a *de facto* and in some cases a *de jure* rejection of the "predisposition" standard of the majority in *Sorrells* v. *United States*, 287 U.S. 435 (1932). Regardless of the expressed rationales, the courts have condemned and prohibited prosecutions based on excessive creative activity by government officials even where the defendant's predisposition seems clear. Following this reasoning, some courts, including the court below, have established an entrapment-related defense based on creative government activity under which the government may not supply the contraband upon which a prosecution is based.

II. Courts have found it permissible for an official to offer an opportunity for crime; more creative activity than that is not justified by a legitimate state interest. Supplying an element of the crime implies that that element was available only from the government, and creates a correspondingly great risk of convicting the innocent.

III. The problem of creative activity by officials in complex cases involving political dissenters, makes it essential that the *per se* defense recognized below be adopted by this Court.

ARGUMENT

I.

The history and present status of the entrapment defense supports the decision of the court below.

A. Historical Background of the Entrapment Defense

Entrapment is a judicially created doctrine dating back to 1916.[1] It was first discussed by this Court in *Casey* v. *United States*, 276 U.S. 413 (1928), where Justice Brandeis, dissenting, said the government

> "... may not provoke or create a crime and then punish the criminal, its creature.
>
> • • •
>
> "This prosecution should be stopped, not because some right of Casey's has been denied, but in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts." 276 U.S. at 423-25.

In *Sorrells* v. *United States*, 287 U.S. 435 (1932), a divided Court attempted to define the doctrine, but the

[1] The first decision was *Woo Wai* v. *United States*, 223 F. 412 (9th Cir. 1916).

themes of their division are still with us today. Sorrells was charged with selling one half-gallon of whiskey in violation of the National Prohibition Act. A government agent had visited Sorrells, reminisced about their experiences in the same division during World War I, and, after three requests, was sold a half-gallon of whiskey. Sorrells' request for a jury charge on entrapment was denied by the trial judge.

This Court reversed the conviction and ordered a new trial. In an opinion written by Chief Justice Hughes, the majority framed an entrapment defense prompted by improper governmental conduct but available only to "otherwise innocent persons." The defense was based on an unexpressed intent of Congress to exclude from its criminal statutes the injustice that conviction of entrapped "innocents" would accomplish. Regardless of the nature and extent of the governmental activity, the Court said, there is no entrapment if the defendant has the "predisposition" to commit the crime or if the "criminal design" originates with the defendant.

There are fundamental theoretical and practical problems with this approach. It is contrary to our traditions and beyond our scientific knowledge to attempt to distinguish the criminal from the noncriminal by predispositions or propensities to commit crimes. It is one thing to infer an intent from an act; it is quite another to give crucial significance to a predisposition which is antecedent to and separate from the act itself and the intent to do the act.[1]

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[1] Nor should we, if we are going to hinge criminality on propensities (even in this limited context), limit ourselves to those who claim entrapment or even to those charged with crime. Assuming an entrapment and therefore the government's responsibility for all but the predisposition, what the *Sorrells* approach does, in a limited context, is to make "predisposition" a crime.

Second, are there really any "innocents" among defendants who have *all* done exactly what Congress has defined as criminal? Those who refuse the government's inducements, provocations or temptations are neither entrapped nor charged with crimes. Clearly, all defendants claiming entrapment who have been induced, provoked or tempted by a government agent, have demonstrated a "predisposition" to commit the crimes they have committed. We know this because they have committed them. They may not have originated the exact plan or the exact details,[1] but they are all "predisposed" in the sense that they all proved to be open to do what they have done, given the inducement, provocation or temptation. Can we say that any of them are *more* predisposed than they *all* are in this sense? Can we say with any real meaning, for instance, that a defendant who has illegally sold liquor ten times after inducement by an agent is more predisposed than one who has done it once after the same inducement? Or that one who must be asked twice is less predisposed than one who completes the sale after the first request? All we really know is that *all* of them are predisposed to sell liquor illegally when induced. And the only appropriate question is whether the governmental conduct is proper; whether, in *Sorrells*, for example, it was proper for the agent to ingratiate himself with the defendant by use of friendship and comradeship and then ask him to commit the crime three times. If entrapment is acknowledged to be illegitimate, it should be because the government has acted improperly, not because the defendant is "innocent."

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[1] The *precise* criminal act or plan may originate with the government, but the criminal design to do it, no matter how induced, provoked, tempted, or coerced, lies in the mind of the defendant.

Further, this predisposition that purports to distinguish the "innocent" from the "guilty" is impossible of reliable proof. The courts that have followed the *Sorrells* approach do not attempt a dissection of the defendant's mind; they merely rely on the past activities of the defendant, including, in some cases, even suspected and rumored activities for which the government has insufficient evidence to obtain an indictment and conviction.[4] Thus, if one has violated the law in the past, it is assumed that he or she is "predisposed" to do it again. Stated another way, in more practical terms, it means the government is *allowed* to entrap persons with criminal records or bad reputations. The government can selectively prosecute persons it does not like for crimes that it manufactures.

Justices Roberts, Brandeis and Stone, concurring in *Sorrells*, had a different view. They found that the Hughes approach adopts:

> "... a form of words to justify action which ought to be based on the inherent right of the Court not to be made the instrument of wrong.
>
> "• • • •
>
> "Whatever may be the demerits of the defendant or his previous infractions of law, these will not justify the instigation and creation of a new crime, as a means to reach him and punish him for his past misdemeanors ... [T]o say that such conduct by an official of the government is condoned and rendered innocuous by the fact that the defendant had a bad reputation or had

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[4] See, e.g., *Becker* v. *United States*, 62 F.2d 1002 (2nd Cir. 1933). See generally Cowen, *The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons*, 49 J. of Crim. L., Criminology, and P.S. 447 (1959).

previously transgressed is wholly to disregard the reason for refusing the processes of the court to consummate an abhorrent transaction. It is to discard the basis of the doctrine and in effect to weigh the equities as between the government and the defendant when there are in truth no equities belonging to the latter, and when the rule of action cannot rest on any estimates of the good which may come of the conviction of the offender by foul means." 287 U.S. at 456-59.

Thus the lines were early drawn. The Hughes approach, based on a statutory interpretation,[5] recognized the need to stem "shocking" governmental conduct, but only for "innocents" and those not "predisposed" to crime, a task illogical in theory and impossible in practice. The Roberts approach, based on the inherent supervisory power of the Court and public policy, and implemented by the courts, focused on the evil to be remedied—lawless, reprehensible government conduct—and not the individual entrapped.[6]

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[5] Given the basis for the Hughes ruling, the entrapment defense could, under that view, be abolished by statute. In a similar vein, Justice Roberts asked, concerning the availability of the defense only for "innocents," "Is the statute upon which the indictment is based to be further construed as removing the defense of entrapment from [defendants with bad records or reputations]"? 287 U.S. at 458.

[6] See Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs*, 60 YALE L.J. 1091, 1111 (1951):

"Clearly entrapment is a facet of a broader problem. Along with illegal search and seizures, wire tapping, false arrest, illegal detention and the third degree, it is a type of lawless law enforcement. They all spring from common motivations. Each is condoned by the sinister sophism that the end, when dealing with known criminals or the criminal classes, justifies the employment of illegal means."

The issues were next confronted in *Sherman* v. *United States*, 356 U.S. 369 (1958). Sherman and an agent met at a doctor's office where they were both being treated for drug addiction. After first refusing, Sherman secured some heroin for the agent and himself. Chief Justice Warren, writing for a majority of five, held there was entrapment as a matter of law, but specifically refused to reconsider *Sorrells* because the issues were not raised below or argued before the Court. The crucial questions—the basis for the doctrine and whether the focus is the government conduct alone or includes an evaluation of the individual defendant—were specifically left open by the majority.

Justice Frankfurter, joined by Justices Harlan, Douglas and Brennan, concurred in an extraordinary opinion that is worth quoting at length:

> "[T]he lower courts have either ignored [*Sorrells*] and continued to rest decisions on the narrow facts of each case, or have failed after penetrating effort to define a satisfactory generalization, see, e.g., United States v. Becker, 62 F.2d 1007 (L. Hand, J.) . . .
>
> "If the defendant is to be relieved from the usual punitive consequences, it is on no account because he is innocent of the offenses described. . . . conduct is not less criminal because the result of temptation. . . .
>
> "Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and then to refuse to sustain such methods by effectuating

them. They do this in the exercise of a recognized jurisdiction to formulate and apply 'proper standards for the enforcement of the federal criminal law in the federal courts,' *McNabb* v. *United States*, 318 U.S. 332, 341, an obligation that goes beyond the conviction of the particular defendant before the court. Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake. . . .

"The crucial question, not easy to answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below the standards, to which common feelings respond, for the proper use of governmental power. . . .

"No matter what the defendant's past record and present inclinations to criminality, or the depth to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society. . . .

"Permissible police activity does not vary according to the particular defendant concerned; surely if two suspects have been solicited at the same time and in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition. No more does it vary according to the suspicions, reasonable or unreasonable, of the police concerning the defendant's activities." 356 U.S. at 379-83.

Thus, under the Frankfurter-Roberts approach, entrapment is a self-preservation and self-protection device for

the courts and society, based on the inherent supervisory power of the courts and public policy[7] and implemented by the courts. Its purpose is preservation of the integrity of the courts and society and prohibition of overzealous law enforcement that promotes rather than detects crime. And the very real danger of selective prosecution of persons with bad records or reputations whom the government wishes to punish for political (see Point III, *infra*) or other reasons based on government manufactured crimes —which is embraced under the Hughes approach—is specifically recognized and eliminated under the Frankfurter-Roberts approach. *Id.* at 383.[7a]

The latest discussion of entrapment by this Court came in *Lopez* v. *United States*, 373 U.S. 427 (1963). The majority opinion by Justice Harlan, who joined with Justice Frankfurter in *Sherman*, concludes that the controversy concerning the basis, focus, and implementation of the en-

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[7] Some courts and scholars also find the doctrine to be compelled by the Fifth Amendment. See, e.g., *Banks* v. *United States*, 249 F.2d 672 (9th Cir. 1957); *Butts* v. *United States*, 273 F. 35 (8th Cir. 1921); *United States* v. *Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970); *Cowen*, *supra* note 4, at 449; *Donnelly*, *supra* note 6; Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 883-84 (1963); Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245, 263 (1942); Comment, 74 YALE L.J. 942 (1965), Comment, 1964 U. ILL. L. FORUM 821, 826 (1964).

[7a] In 1959, the American Law Institute, in its Model Penal Code, Tent. Draft No. 9 Sec. 2.10, set forth a codification of the Frankfurter-Roberts view, defining entrapment by an objective standard of "substantial risk":

> employing methods of persuasion or inducement which produce a substantial risk that such an offense will be committed by persons other than those disposed to commit it.

trapment defense is unresolved. Since there was no substance to the entrapment claim in *Lopez*, these questions did not have to be resolved, but this Court said of entrapment, without dissent:

> "The defense of entrapment, its meaning, purpose, and application, are problems that have sharply divided this Court on past occasions. [Citation omitted.] Whether in the absence of a conclusive showing the defense is for the court or the jury, and whether the controlling standard looks only to the conduct of the Government, or also takes into account the predisposition of the defendant, are among the issues that have been mooted. . . .
>
> "The conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents." *Id.* at 434 (emphasis in original).

As one might expect, *Lopez* has been read by many courts to be an invitation to reassess the entrapment defense and move in the direction of the Frankfurter-Roberts approach. E.g., *Smith* v. *United States*, 331 F.2d 784 (D.C. Cir. 1964) (en banc); *United States* v. *Morrison*, 348 F.2d 1003 (2d Cir.), *cert. denied*, 382 U.S. 905 (1965); *Kadis* v. *United States*, 373 F.2d 370 (1st Cir. 1967); *United States* v. *Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970). That approach, approved during the past forty years by seven Justices of this Court, is still open for approval by a majority.

B. Present Status of the Entrapment Defense

It is our thesis in this section that the Frankfurter-Roberts view—which focuses solely on the government conduct—is not only wiser and more consistent with an ordered, civilized society, but also is now accepted, either *de jure* or *de facto*, by the majority of lower federal courts. The defense recognized by the court below may be viewed as following from the Frankfurter-Roberts approach, or as the court below viewed it, from "*creative* activity" raising "the same underlying objections which render entrapment repugnant to American criminal justice . . ." 459 F.2d at 674, quoting *Greene* v. *United States*, 454 F.2d 783, 787 (9th Cir. 1971) (emphasis added). To establish this thesis we have divided the cases for the purpose of this discussion into five categories: (1) cases still using the language of *Sorrells*: "innocence" and "predisposition"; (2) cases explicitly adopting the Frankfurter-Roberts view; (3) cases adopting both *Sorrells* and the Frankfurter-Roberts view as alternative bases; (4) cases limiting "predisposition" by the concept of abandonment; and (5) cases concerning "creative government activity" not traditionally thought of as entrapment.

1. *Cases Still Using the Language of Sorrells:* "Innocence" and "Predisposition"

Most courts use the language of *Sorrells* concerning "innocence" and "predisposition." A close examination of the facts in these cases, however, reveals that when the government conduct is seriously improper, the courts sustain the entrapment defense, even in the face of clear proof of "predisposition," in effect applying the Frankfurter-

Roberts approach.[8] This point can be demonstrated by an examination of the facts in many cases, commencing with *Sorrells* itself.

In *Sorrells*, although this Court only remanded for a new trial, the majority repeatedly referred to the "innocence" of the petitioner, saying:

> "It is *clear* that the evidence was sufficient to warrant a finding that the act for which the defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, *that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen*, and that the agent lured defendant, *otherwise innocent*, to its commission . . ." 287 U.S. at 441 (emphasis added).

Of course, Sorrells had the "predisposition" in the sense described above, in that we know he was open to sell liquor illegally if a companion from World War I asked him three times. But more importantly, the trial record, as reported in the opinion of the court below, indicated the government had proved that: (1) Sorrells had a reputation in the community as a "rumrunner;" (2) he had subsequently sold liquor illegally to other agents; and (3) his house was subsequently searched and eleven one half-gallons of illicit whiskey—like the one he had sold to the agent—were found. 57 F.2d at 974, 980. This "industrious, law-abiding citizen . . . otherwise innocent," may have been regularly selling whiskey illegally. But the government's role—the induce-

[8] This is both because the "innocence" and "predisposition" concepts are meaningless and open to severe abuse, as is discussed *supra*, and because courts are motivated by the legitimate rationale for the entrapment defense—control of lawless law enforcement and protection of the integrity of the courts and the society.

ment of the defendant by a war companion and the repeated requests—was no better or more properly tolerated because Sorrells was a rumrunner.

Similarly, Sherman had been convicted of two narcotics offenses, five and nine years prior to his arrest, he was addicted to drugs he could only obtain illegally (for which he was undergoing treatment), and he sold narcotics to the government agent. On that record it is hard to explain, or for the lower courts to understand, this Court's finding that, as a matter of law, Sherman was an "innocent" violator. Again, the government conduct, leading the defendant away from treatment and back to his past life with drugs, was the appropriate basis for reversing the conviction.

Since *Sorrells* and *Sherman*, there have been numerous decisions that uphold an entrapment defense based on the language of *Sorrells* but under circumstances where the defendant is factually neither "innocent" nor lacks "predisposition." E.g. *Carbajal-Portillo* v. *United States*, 396 F.2d 944 (9th Cir. 1968) (although defendant was definitely predisposed to sell drugs, court upholds entrapment because defendant was not predisposed to bring them into the United States and sell them here, which he did); *Henderson* v. *United States*, 261 F.2d 909 (5th Cir. 1958) (defendant with prior drug convictions who admitted to prior use found "unwary innocent" even though government agent testified that "we had knowledge that she was in the traffic;" defendant was induced to get drugs from informer's contact for informer and his wife, who were close friends of defendant's and told her they desperately needed the drugs); *United States* v. *Campbell*, 235 F. Supp. 190 (E.D. N.Y. 1964) (agent placed illegal bets with defendant

through a friend of defendant; no repeated requests and evidence that defendant had taken other illegal bets); *United States* v. *Kros*, 296 F. Supp. 972 (E.D. Pa. 1969) (defendant sent obscene material through mail in response to an ad in "Swinger's Life Magazine" placed by the government; court held defendant had predisposition to sell obscene material but no predisposition to do it through the mail, even though defendant responded to the ad from another state and may well have anticipated the use of the mail).

These cases evidence a tortured attempt to find a lack of predisposition when the court believes the government has acted wrongly. Justice Frankfurter recognized this problem with the *Sorrells* approach in *Sherman*:

> "The lower courts have continued gropingly to express the feeling of outrage at conduct of law enforcers that brought recognition of the defense in the first instance, but without the formulated basis in reason that it is the first duty of the courts to construct for justifying and guiding emotion and instinct." 356 U.S. at 378.

There are, however, some threads running through these cases. In each, the government has abused its powers. It has placed an ad in "Swinger's Life Magazine" to entrap lonely readers (*Kros*), encouraged a destitute Mexican citizen to bring narcotics into the United States (*Carbajal*), or interfered with a defendant's attempt to kick drugs (*Sherman*). Very often they involve situations where the government has abused close relationships valued by society, such as friendship or companionship in a war, or interfered with socially useful programs, such as treatment for drug addiction.

2. *Cases Explicitly Adopting the Frankfurter-Roberts View*

A number of courts have explicitly adopted the Frankfurter-Roberts view. *United States* v. *Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970) (pre-trial motion to dismiss indictment based on entrapment granted; defendant had the predisposition, but, "Entrapment is indistinguishable from other law enforcement practices which the courts have held to violate due process. . . . Were the courts to sanction the law enforcement activities committed in this case, it would transform the laws designed to promote the general welfare into a technique aimed at manufacturing disobedience in order to punish, a concept thoroughly repugnant to constitutional principles"); *State* v. *Sains*, —— N.M. ——, 11 Cr.L. 2108 (N.M. Ct. of App. 9/29/72); *People* v. *Sinclair*, 387 Mich. 91, 194 N.W.2d 878 (1972); *Johnson* v. *Commonwealth*, 180 S.E.2d 661 (Va. 1971) ("The defense of entrapment is, in essence, a rule of fairness that bars the conviction of an accused in the event of improper police conduct"); *Grossman* v. *State*, 456 P.2d 226 (Alaska, 1969). See also *Smith* v. *United States*, 331 F.2d 784, 790, 792 (D.C. Cir. 1964) (en banc); *Dixon* v. *District of Columbia*, 394 F.2d 966, 970 (D.C. Cir. 1968); *Carbajal-Portillo* v. *United States*, 396 F.2d 944, 948 (9th Cir. 1968) (entrapment is a defense "not because inducement negatives criminal intent and thus establishes innocence; but because Government agents should not be permitted to act in such a fashion"); *Accardi* v. *United States*, 257 F.2d 168, 172-73 n. 5 (5th Cir. 1958) (favors but does not adopt Frankfurter-Roberts approach); *Robison* v. *United States*, 379 F.2d 338 (9th Cir. 1967) (same). The Frankfurter-Roberts view is also

clearly favored by most scholars who have written on entrapment.[8]

3. *Cases Adopting Both Sorrells and the Frankfurter-Roberts Approach as Alternative Bases*

A number of courts, faced with the division in this Court and the lower courts, have adopted both approaches as alternative bases. *United States* v. *Morrison*, 348 F.2d 1003 (2d Cir.), *cert. denied*, 382 U.S. 905 (1965) (applies *Sorrells* standard and, "alternatively, whether, in exposing the defendant's criminality, the government agents have acted in an offensive manner or lived up to reasonably decent civilized standards for the proper use of government power"); *United States* v. *Dillet*, 265 F. Supp. 980 (S.D. N.Y. 1966); *State* v. *Boccelli*, 105 Ariz. 495, 467 P.2d 740 (1970); *Commonwealth* v. *Harvard*, 356 Mass. 452, 253 N.E. 2d 346 (1969). See also *Kadis* v. *United States*, 373 F.2d 370 (1st Cir. 1967); *Whiting* v. *United States*, 321 F.2d 72 (1st Cir. 1963); *Accardi* v. *United States*, 257 F.2d 168 (5th Cir. 1958); *United States* v. *Kros*, 296 F. Supp. 972 (E.D. Pa. 1969) ("the thrust of the doctrine is to enjoin the Government from acting in improper ways").

4. *Cases Limiting "Predisposition" by the Concept of Abandonment*

Where the "predisposition" has been abandoned but then revived as a result of governmental conduct, courts have upheld the entrapment defense, which makes sense under *Sorrells* as well as the Frankfurter-Roberts approach.

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[8] E.g., Cowen, *supra* note 4; Donnelly, *supra* note 6; Mikell, *supra* note 7; Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORDHAM L. REV. 399 (1959); Note, 46 HARV. L. REV. 848 (1933).

Klosterman v. *United States*, 248 F.2d 101 (3rd Cir. 1957); *Jones* v. *State*, 101 Ga. App. 851, 115 S.E.2d 576 (1960) (bribery charge; the court found that the government sought to trap the defendant and embarrass him in front of the press; "every objection and obstacle which the defendant foresaw was met and solved by the prosecution").

5. *Cases Concerning "Creative Government Activity" Not Traditionally Thought of as Entrapment*

Without specifically adopting or refuting the Frankfurter-Roberts approach, many courts have analyzed entrapment situations in terms of the supervisory power as defined in Justice Frankfurter's concurring opinion in *Sherman*. All of them involve situations where the defendant's predisposition to commit the crime is quite clear (or as clear as that concept can be), but the courts, pursuant to the supervisory power, evaluate only the government conduct.

In *Williamson* v. *United States*, 311 F.2d 441 (5th Cir. 1962) an informer made a contingent fee arrangement with the government; he was to receive a specific amount of money for each specific person he could incriminate. The Court held that such an arrangement must be prohibited pursuant to the supervisory power, that "McNabb and its progeny clearly forbid the Government to make use of the fruits of wrongdoing by its officers or agents." 311 F.2d at 445. Judge Brown, concurring, said:

> "... recognized as is the role of informers in the enforcement of criminal laws, there comes a time when enough is more than enough—it is just too much. When that occurs, the law must condemn it as offensive whether

the method used is refined or crude, subtle or spectacular." 311 F.2d at 445.

In *United States* v. *Bueno*, 447 F.2d 902 (5th Cir. 1971) narcotics were purchased in Mexico, brought into the United States by the informer and then sold to a government agent by the defendant. The Court reversed the conviction, pursuant to the supervisory power, saying:

> "... the sales of heroin were made through the creative activity of the government ... The government's case cannot rest on the mere fact that [defendant] entered into the informer's plan willingly." 447 F.2d 906.

The same result was reached on virtually identical facts in *United States* v. *Dillet*, 265 F. Supp. 980 (S.D.N.Y. 1966) and *State* v. *Boccelli*, 105 Ariz. 495, 467 P.2d 740 (1970).

The same principle was applied in *Smith* v. *United States*, 331 F.2d 784 (D.C. Cir. 1964) (en banc) (informer gave defendant heroin in defendant's apartment; defendant's apartment searched and defendant arrested for possession forty-five minutes later); and *United States* v. *Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970) (undercover agent supplied counterfeit money upon which charge of receiving such counterfeit was based).

In *United States* v. *Greene*, 454 F.2d 783 (9th Cir. 1971) the court noted the sharp division concerning entrapment and created a somewhat different but related defense. Defendants were charged with sale of bootleg liquor, possession of still apparatus, and conspiracy. They had set up a still and were producing bootleg liquor for sale to a man who identified himself as a "syndicate man" but was actually a government agent. The agent assisted de-

fendants over a long period of time and supplied, *inter alia*, parts for the still, containers, and chemicals. The Court found the bootleg liquor "might never have [been] produced" without the assistance and urging of the agent. The Court held:

> "We do not believe the Government may involve itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operations, and yet prosecute its collaborators. As pointed out in *Sherman* v. *United States*, *supra*, at 372 a certain amount of stealth and strategy 'are necessary weapons in the arsenal of the police officer.' But, although this is not an entrapment case, when the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative. Under these circumstances, the Government's conduct rises to a level of 'creative activity' (*Sherman*, *supra*, at 372), substantially more intense and aggressive than the level of such activity charged against the Government in numerous entrapment cases we have examined." 454 F.2d at 787.

In summary, it is clear that even before the decision of the court below, the courts had set their faces against excessive creative activity in manufacturing crimes, regardless of the rationale adopted in the particular case. The cases in the foregoing sections, even those which appear to go beyond the entrapment defense, may be justified under the Frankfurter-Roberts view, and it is the position of *amici curiae* that that standard should be adopted by this Court.

II.

It is impermissible creative activity for the government to supply the contraband upon which a prosecution is based.

The decision of the majority below in this case, together with the cases relied on there, see Point I (5) *supra; United States* v. *Bueno, supra; United States* v. *Chisum, supra; People* v. *Strong,* 21 Ill.2d 320, 172 N.E.2d 765 (1961), have in effect adopted the position that it is a *per se* defense to a contraband crime if the government has supplied the contraband. *Amici* urge the view that this conclusion is compelled under any theory of the law, although it is almost self-evident under the Frankfurter-Roberts view.

An examination of the policies which lie behind the defense of entrapment, as it has been recognized by this Court, illuminates the policies underlying the decision of the court below. The courts permit agents of the government to offer to a suspected person an opportunity to commit a crime, because otherwise many crimes, especially those involving contraband, could not otherwise be detected. The state has an interest only in apprehending those engaged in criminal activity by the mere offer of a neutral opportunity, see *Sorrells* v. *United States,* 287 U.S. at 441, not in the "manufacturing of crime," *Lopez* v. *United States,* 373 U.S. at 434. There is no state interest in intervening in contraband trade in such a way as to obtain any result other than an arrest based upon an opportunity. If the government supplies the contraband, then it is not acting within the bounds of its legitimate interest.

It will be argued that in a case such as this the government did little different from offering an opportunity; the

defendant was willing to commit the crime and would have done so *if he had been able.* But if that is so, it is impossible to explain why in fact the government did not simply wait until he did commit it *sua sponte,* that is, until he himself obtained the components, manufactured the drug and sold it to the agent. By the act itself of supplying the contraband, or a necessary element of it, the government has told us that merely to supply an opportunity to the defendant was not enough; if it were enough, then that is surely exactly what the government would have done.

This inescapable proposition lies behind all the decisions which condemn any conviction for a contraband crime if the goverment supplies the contraband. The court below suggested as much by its finding that the component, phenyl-2-propanone, could not have been obtained without the intervention of the agent. The dissent disputes that finding, but whether or not it is in fact the case that the component was available from another source is beside the point. If the component really was so easily available, then it was simple for the government merely to wait and buy the finished product from the defendant. The government has implied by its conduct that the crime would not have been committed without its intervention, and cannot now say that it would have been committed in some other way.[10]

The majority below cited this Court's decision in *Raley* v. *Ohio,* 360 U.S. 423 (1959), and the government has branded that reference "inapposite" (Brief for the United States, p. 26 fn. 17). That case is different from this, because there the state had actually advised the defendant

[10] The government apparently concedes, in principle, that the rule advanced here should be the law, although not in this case. Appellants' brief, pp. 11, 27, 32.

that his conduct was permissible. But the estoppel principle which underlies that decision is similar to the one which underlies this: the government, having shown by its conduct that the offer of an opportunity alone was not enough to effect an arrest, cannot now take the position that such an offer was sufficient. See Note, *Applying Estoppel Principles in Criminal Law*, 78 Yale L.J. 1046 (1969).

Other policy considerations support this basic principle. For the government to supply contraband makes it all but impossible to determine whether a given defendant would have sold it without the official source of supply. Under the Frankfurter-Roberts version of the defense of entrapment, it may be said that such supply as a matter of law creates a substantial risk that a person not predisposed will commit the crime—an innocent person will be convicted. Under the *Sorrells* formulation of the defense, it may be said that, when the government supplies the contraband, as a matter of law, the likelihood that the defendant would commit the particular crime cannot be known beyond a reasonable doubt.[11]

In sum, to permit a conviction for the sale of contraband which the government has supplied violates fundamental standards of fairness in two ways. First, there is no interest of the state in prosecuting a manufactured crime; the interest of the state at most supports offering an opportunity to commit a crime which would otherwise be committed. As a matter of logic, supplying the contraband exceeds the bounds of that interest. Second, the interven-

[11] It may be argued that this statement is less true under the special facts of this case, because the defendant showed his propensity by manufacturing the drug. That argument ignores the possibility that the drug might never have been made at all, without the government's intervention.

tion of the government in the supply automatically increases the likelihood that the crime will be committed by someone who would not otherwise have committed it. These two considerations converge to make the conviction in this and similar cases unsupportable either under the Fifth Amendment or under the supervisory powers of this Court.

III.

The defense recognized by the court below is essential for the preservation of political liberties.

This case presents an issue of law of great public importance at this time. The question of the permissible degree of "government intervention" in the commission of crimes has been raised as a public matter repeatedly in recent cases of great notoriety involving prosecutions of political dissidents. As Learned Hand put it,

> "Nor should we forget that what seems fair enough against [liquor law offenders] may take on a very different face if used by a government determined to suppress political opposition . . ." *United States* v. *Kirschenblatt*, 16 F.2d 202, 203 (2nd Cir. 1926).

Some of the cases involve the actual supplying of contraband, in a manner parallel to this case and its recent forebears. The appendix filed in this Court in the case of *United States* v. *Freed*, which came before this Court on a different point, 401 U.S. 601 (1971), discloses that the unregistered hand grenades which the defendants were indicted for possessing were physically brought to them by an agent of the police.

It is reported that at a trial for conspiracy to cause a riot, in the United States District Court at Tacoma, Washington, an undercover agent testified that he was directed by his government superiors to offer to purchase dynamite and blasting caps, and that he did purchase potassium chlorate, supposedly to make fire bombs. *New York Times*, December 8, 1970, p. 52. It is further reported that one Thomas Tongyai, a government agent operating in Geneva, New York, supplied and taught the use of a rifle and a bomb to college students. Rosenbaum, "Run, Tommy, Run," *Esquire*, July, 1971, pp. 51, 58-59; Donner, "Agent-Provocateur as Folk-Hero," *Civil Liberties*, September, 1971.

Supplying contraband upon which an arrest may be based, either for its possession or some derivative crime, is of course one of the simplest tools of provocation against political dissidents. To cite only one example from a long and dishonorable history, Mussolini's secret police, the OVRA, discredited its enemies and obtained their arrest by planting explosives and weapons. Bramstedt, *Dictatorship and Political Police* (1945), pp. 59-60.

The problem, however, is not limited to the supplying of contraband; there has been a pervasive growth of the "degree of governmental participation" in allegedly criminal enterprises of political dissidents. It is only a step from the supplying of contraband to the provocation of more complex crimes. Cf. *Greene* v. *United States*, *supra*. It has become clear in several recent cases that agents have supplied the driving force for actions resulting in arrests for conspiracy and other criminal charges. See Donner, "The Confessions of an FBI Informer," *Harper's*, December, 1972, pp. 54, 58 (relative to pending prosecution of members of Vietnam Veterans Against the War); Rosen-

baum, *op. cit.*; Donner, *op. cit.*; Chevigny, *Cops and Rebels* (1972) *passim*, esp. 249-276 (collects cases and analyzes one prosecution of Black Panthers). Of these, perhaps the clearest example has occurred in *United States* v. *Anderson, et al.* (D.N.J. Cr. No. 602-71), in which the defendants are charged with conspiracy to destroy and destruction of selective service records. In that case, the government agent, Robert Hardy, stated in an affidavit sworn to February 28, 1972, and filed in the case (affidavit at p. 4):[12]

"It definitely wouldn't have happened without me.

I provided 90% of the tools necessary for the action. They couldn't afford them, so I paid and the FBI reimbursed me. It included hammers, ropes, drills, bits, etc. They couldn't use some of the tools without hurting themselves, so I taught them. My van was used on a daily basis (the FBI paid the gas). I rented trucks for the dry runs and provided about $20 to $40 worth of groceries per week for the people living at Dr. Anderson's. This, and all my expenses, were paid for by the FBI."

Hardy further admitted that he worked with the defendants daily for over two months and provided the strategies and

[12] The *Anderson* case is still pending. The 28 defendants made a pre-trial motion requesting an evidentiary hearing and dismissal of the indictment based on the informer's affidavit, which was denied by the court. In an opinion and order dated August 4, 1972, the court said that although the affidavit raises "serious questions" and its veracity was not repudiated by the government, the issue should be decided at trial. The trial has been scheduled for February 5, 1973.

The *Anderson* case and the other pending cases discussed here, are presented only to show the importance of the instant case to the question of undercover police work with respect to political groups.

necessary tools and equipment (at government expense) for getting into the building and into the file cabinets. He "told the FBI many times that it couldn't have happened if I wasn't there." Here is a signal case of the creative activity of the government which the defense urged here is designed, in part, to curtail. The political provocateur does not necessarily supply the original idea; what he does supply is organization and materials without which the idea would die stillborn. Contraband is usually a part, but only a part of what he brings. The provocateur has, moreover, the courage of a lion and the resourcefulness of Odysseus, because he does not fear detection and arrest as do his putative partners.

In *Anderson* and similar cases, it has been the function of the agent to pull together the "predispositions" of dissidents, often otherwise impractical, into a viable working unit. Adherence to the *Sorrells* approach, with its emphasis on predisposition, would leave the federal courts powerless to limit such political provocations and manufactured crimes. The *per se* defense recognized by the court below thus becomes an essential protection against a growing official abuse.

What a political provocateur does is analytically no different from what government agents have done in this case and other cases concerning impermissible creative activity. These agents make a crime viable by such intervention that it is impossible to determine afterward whether the same crime would have occurred without them (or, in some cases, by such intervention that it is possible to determine that it likely would *not* have happened).

If it is clear that contraband cannot be supplied, then half the tools of the provocateur are gone; moreover, if

the agent cannot supply the raw materials, it will be more difficult for him to supply the binding force of will for a crime. Finally, *amici* have argued above that the state interest in rejecting the defense is very weak. The interest in the healthy development of a political life free from the distortions occasioned by provocation and of individuals in being free from police control is much stronger. In the words of Thomas Erskine May, II *Constitutional History of England* (1899 Ed.) p. 276:

> "Not to profit by timely information were a crime; but to retain in Government pay, and to reward spies and informers, who consort with conspirators as their sworn accomplices, and encourage while they betray them in their crimes, is a practice for which no plea can be offered. No Government, indeed, can be supposed to have expressly instructed its spies to instigate the perpetration of crime; but to be unsuspected, every spy must be zealous in the cause which he pretends to have espoused; and his zeal in a criminal enterprise is a direct encouragement of crime."

If these words are to be fully effective, the defense adopted by the court below must be our law.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

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January 1973

FILE COPY

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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1585

UNITED STATES OF AMERICA, Petitioner

v.

RICHARD RUSSELL

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1585

UNITED STATES OF AMERICA, Petitioner

v.

RICHARD RUSSELL

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether the United States Government can both provide an indispensible element, without which there could be no crime, and then prosecute the person who has been furnished that indispensible element for the commission of the crime.

STATEMENT

The respondent, Richard Russell, along with two co-defendants, was indicted and convicted for the unlawful manufacture and delivery of methamphetamine, in violation of 21 U.S.C. 331 (q)(1), 360 a(a) and 333

(b)(1), and of having unlawfully sold and delivered that drug, in violation of 21 U.S.C. 331 (q)(2), 360 a(b) and 333 (b)(1). The indictment was in five counts but respondent was only charged in three. Patrick Connelly was convicted on all five counts; John Connelly was also named as a defendant but did not appear for trial. Neither Patrick nor John Connelly is involved in this appeal.

Both at the conclusion of the Government's case in chief and at the close of all the evidence, respondent moved for dismissal on the grounds that he had been entrapped as a matter of law (Tr. 114, 161)[1] and objected to the court's instruction on entrapment (Tr. 192).

On appeal, respondent's conviction was reversed by the Court of Appeals for the Ninth Circuit and the Indictment ordered dismissed. The appellate court held that respondent was entitled to dismissal as a matter of law because of the "intolerable degree of governmental participation in the criminal enterprise." That court held respondent was denied due process regardless of whether the traditional entrapment or traditional due process repugnance to overzealous law enforcement label was applied.

Most of the facts are not disputed. On or about December 7, 1969, an undercover agent of the Bureau of Narcotics and Dangerous Drugs, Joe Shapiro, met with all three defendants at the home of respondent. Shapiro represented himself as a member of a syndicate anxious

[1] "Pet.App." refers to the appendix to the petition for a writ of certiorari. "App." refers to the joint appendix in this Court; "Tr." refers to the transcript of proceedings at trial also on file with the Clerk.

to control the distribution of methamphetamines and volunteered to supply phenyl-2-propanone, a chemical necessary for the manufacture of the drug, in return for one-half of the methamphetamine produced, but first wanted to observe the place of manufacture, which was located in Patrick Connelly's home. This chemical was hard to obtain because, at the request of the Bureau of Narcotics and Dangerous Drugs, drug firms had taken it off the market. (App. 13, 14; Tr. 82). On the following day, December 8, 1969, respondent and Patrick Connolly attempted to purchase phenyl-2-propanone at a drug supply house but were unsuccessful (Tr. 17). On the evening of December 9, 1969, Shapiro met with Patrick Connelly and respondent at Patrick Connelly's home. Shapiro provided a bottle containing 100 grams of phenyl-2-propanone, which was used to manufacture methamphetamines that night (App. 8; Tr. 22). The extent to which Shapiro assisted the operation is somewhat cloudy, but Shapiro admits to placing several pieces of foil that had fallen to the floor in the flask. (App. 12, 13; Tr. 71, 87). Pursuant to his offer to supply the chemical, Shapiro received one-half of the drug produced. It was this manufacturing that formed the basis of the charges against respondent. Subsequently, Shapiro purchased some of respondent's portion of the drug for sixty dollars, and this sale formed one count of the Indictment.

It is undisputed that the chemical provided by Shapiro was used for the manufacture of the drug and the resultant sale for which respondent was convicted. Shapiro testified there was discussion on December 7, 1969 that respondent had no phenyl-2-propanone, and further that he saw no other phenyl-2-propanone on the premises on December 9, 1969 nor was there any

production of methamphetamines on December 8, 1969 (App. 14-15, Tr. 83-85).

So far as respondent is concerned, that ended his involvement in the case. Approximately one month later, on or about January 9, 1970, Shapiro met with Patrick Connelly concerning further transactions but respondent was not involved (App. 10, 11, Tr. 33, 34). Outside of the events of December 7-10, 1969, there was no evidence that respondent had been involved in any drug traffic or manufacturing, or that he was other than a law-abiding citizen. This is important because there is a dispute between petitioner and respondent about the extent of the evidence relating to respondent's involvement. As the Government's brief indicates, the evidence showed that Patrick Connolly had been involved in manufacturing since May, 1969 (Pet. brief, p. 3), but there is no evidence that respondent Russell had so done. Likewise, it was John Connolly who gave Shapiro a sample of the illegal drug and it is not established that respondent had anything to do with this, and the laboratory, such as it was, was located in Patrick Connolly's home. All this is important because the Government has accepted the erroneous factual conclusions of the dissenting judge below and asks this court to do likewise. There simply is no direct evidence that Richard Russell was able to acquire phenyl-2-propanone from any source other than the government employee, Shapiro. Indeed, as the evidence shows, respondent and Patrick Connolly had attempted to purchase this chemical but were unsuccessful (Tr. 17).

The evidence is clear that but for the voluntary proposal of Shapiro to supply phenyl-2-propanone, Richard Russell could not have committed the crime for which he was convicted. The Government apparently

believed this to be the case as the indictment charges the Connolly brothers, but not respondent with delivering methamphetamines on December 7, 1969 and Patrick Connolly only with such a delivery on January 7, 1970. The three counts of the indictment charging respondent were all alleged to have occurred on December 10, 1969.

It may be that an inference can be drawn that Richard Russell had a predisposition to sell and manufacture drugs. Respondent does not press the argument that there is *no* such evidence, but firmly asserts that it was of the most tenuous nature and illustrates the evils of the traditional views on entrapment.

Even, however, if the petitioner's version of respondent's predisposition is assumed to be true, the respondent was entrapped as a matter of law. For there is no escaping the fact that Richard Russell was only able to commit a crime on December 10, 1969, because the Government voluntarily supplied the indispensible ingredient.

SUMMARY OF ARGUMENT

This case presents a new problem that this Court has not passed upon. This problem is: to what extent this Court will sanction the activities of government law enforcement agents in creating crimes, in providing essential ingredients, without which there could be no crime. The prior decisions of this court, *Sorrells v. United States*, 287 U.S. 435 and *Sherman v. United States*, 356 U.S. 369, do not answer the problem because they were concerned with the historic embodiment of entrapment, solicitation or inducement. The majority opinions in those cases focused on the intent or predisposition of the defendant to commit a crime, when what the government

agent did was to provide the opportunity to do what the defendant already could do by himself. The present situation involves the government far further in crime, to the point of completing the link between the defendant's opportunity and the completed crime by supplying the indispensible missing element, in this case phenyl-2-propanone, without which all the respondent's desires to commit a crime would be insufficient. All the courts that have considered this new problem have condemned the government's actions.

This court has condemned the government's soliciting crime when such activity starts with the government; it must, consistently, deny the government the right to prosecute when agents go further than solicitation and provide the indispensible link without which there could be no crime to prosecute.

There are two elements in the governmental involvement in criminal cases: first during the investigative phase up to arrest and second, the prosecutive phase. If, in the first phase, the government fails to meet the applicable standards, it must be denied the right to proceed to the second or the second becomes a sham. Thus, when there is an illegal search and seizure in the investigative phase, the government is denied the right to introduce the fruits in the second. Likewise, where a confession is taken in an improper manner, it is inadmissible at trial. Likewise, where eyewitness identification is tainted, its introduction is restricted at trial. The true nature of the defense raised in this case is bottomed on the same due process considerations. The respondent only asks that this court condemn like activities of government agents. "It is not their [officers of the law] duty to incite to and create crime for the sole purpose of

prosecuting and punishing it. . . . *Butts v. United States*, 273 F. 35, 38 (8th Cir. 1921) as cited with approval in *Sorrells v. United States*, 287 U.S. 435, 444 (1932).

All courts have wrestled with the rationale of the entrapment defense. Yet, even under the traditional exposition of entrapment, as enunciated in *Sherman* and *Sorrells*, the respondent was clearly entrapped as a matter of law. In both those cases, the government manufactured the crime, as was the case here. For all the evidence here showed, the inability to acquire phenyl-2-propanone could well have discouraged Russell from proceeding further; the arrest of others for drug violations may have deterred Russell from further involvement; or the danger created in attempting to acquire phenyl-2-propanone created by the government's activities with the drug suppliers, could have deterred respondent. As this court stated in *Sherman*, "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly that function does not include the manufacturing of crime." 356 U.S. at 372. Likewise, this court in *Sorrells*, as cited in *Sherman*, stated ". . . entrapment occurs only when the criminal conduct was the product of the *creative* activity of law enforcement officials." (Emphasis by the court) 356 U.S. at 372.

Under the circumstances of this case, the views of the three concurring justices in *Sorrells*, and the four concurring justices in *Sherman* provide the proper rationale for entrapment.

In *Sherman*, at page 376, Mr. Chief Justice Warren stated in declining to reassess the doctrine of entrapment outlined in *Sorrells*, that the issue was not raised in the trial or appellate court, so ". . . ordinarily [the Court does not] decide issues not presented by the parties and there

is good reason not to vary that practice in this case."[2] This case affords the court a clear opportunity to undertake that reassessment, as the issue has been raised by respondent at every level, and accepted by the Court of Appeals.

The majority test for entrapment provides no guide for law enforcement officers or defendants; unfairly discriminates between defendants, not on their acts, but on the basis of their prior status; prejudices defendants from raising entrapment as a defense or exposes them to all kinds of hearsay, inuendo and suggestion by the prosecution ostensibly to show "predisposition", but which easily slides over as substantive evidence in a juror's mind that the defendant did the act for which he stands charged and leads courts into tortured reasoning to find entrapment. As this very court said at pages 375-6 of *Sherman v. United States*, 356 U.S. 369, a case where entrapment was found as a matter of law:

> "However, a nine-year old sales conviction and a five-year old possession conviction are insufficient to prove petitioner had a readiness to sell narcotics at the time Kalchinian [the informer] approached him, particularly when we must assume from the record he was trying to overcome the narcotics habit at the time."

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[2] A like notation is made in *Masciale v. United States*, 356 U.S. 386, footnote 5, decided the same day. A suggestion to reexamine the entire doctrine was also made in *Lopez v. United States*, 373 U.S. 427, 434.

ARGUMENT

I

THE SUPPLYING BY THE GOVERNMENT EMPLOYEE OF THE INDISPENSIBLE INGREDIENT WITHOUT WHICH THERE COULD BE NO CRIME CONSTITUTES A DUE PROCESS VIOLATION.

The respondent's main thesis is that the role of the government during the prearrest stage reveals a crucial difference from the prior cases considered by this Court and that due process requires an affirmance of the Court of Appeals.

If this Court is unwilling to examine the nature of the government agent's actions in this case, the result may well be simply another opinion on a factual analysis of whether the evidence of Richard Russell's "predisposition" to commit crimes of the nature for which he was charged was such that the trial judge should have decided as a matter of law that the defendant was entrapped. Unless the respondent can show this Court that the nature of the governmental action was of a qualitatively difficult nature than all the prior decisions, the opportunity afforded by the granting of the writ of certiorari will be substantially lessened.

The traditional entrapment defense, while now well established, has infrequently been considered by this Court and has resulted in constantly recurring problems based on the fact that the underlying rationale is uncertain and the courts, including this Court, have not been of one view as to which is the correct approach. The defense of entrapment can focus either 1—on the conduct of the government agent, in which event the question revolves around whether or not the law enforcement

officer has transgressed objectively set standards or 2—the innocence of the defendant, in which event the question becomes whether or not, as a subjective matter, the origin for the particular crime charged commenced with the defendant or was implanted in his mind by the government agent. It is these conflicting viewpoints that gave rise to the differing opinions of the majority and concurring justices in *Sorrells v. United States*, 287 U.S. 345 and *Sherman v. United States*, 356 U.S. 369. In the case at bar, however, other considerations are presented for this Court's opinion and it makes no difference which view is adopted.

Indeed, it is respondent's primary contention that the question presented by this case does not involve entrapment at all. The classic definition of entrapment was stated by Mr. Justice Roberts in his concurring opinion in *Sorrells v. United States*, 287 U.S. 435, wherein at page 454, he stated:

> "Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer."

Although, as noted below, the respondent, in the alternative, argues that under the facts of this case entrapment under the above definition was established as a matter of law, the respondent believes that the more correct way to analyze the problem presented in this case is not to regard it as an entrapment case at all but to question whether the respondent received due process by the acts of the government agent in providing him with the indispensible chemical necessary to manufacture and thus deliver and sell methamphetamine. The respondent takes this position because he believes that an analysis of

the cases discussing entrapment indicate that the entrapment rationale is insufficient when the government agent provides the indispensible chemical, the counterfeit money, the illegal drug, to the very person who is then charged with a crime growing out of such transfer.

From its earliest federal expression in *Woo Wai v. United States*, 223 Fed. 412 (9th Cir. 1915), the doctrine of entrapment has been concerned with solicitation or inducement. In *Woo Wai*, a conviction for conspiracy to bribe immigration officers was reversed where the evidence showed that the defendant had been repeatedly solicited by other immigration officials to commit the illegal act. In that case, the court stated that entrapment was a good defense to a criminal charge because "A sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statute." *Woo Wai v. United States*, 223 Fed. 412 at 415. Thus in the federal courts, the defense of entrapment commenced its legal existence on the solicitation theory.[3]

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[3]The theoretical reason for the existence of the entrapment defense is not often articulated, but DeFeo in an article "Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application", 1 U.SanFran. L. Rev. 243, 250-1, explains the existence of the defense as growing out of the proliferation of statutory crimes, which he entitled "welfare offenses, no longer based on force, fraud or stealth [that] call forth no ready complaintant, as all involved are willing participants and cannot be expected to complain." As a result, the article argues, police officers had to use new and different methods to uncover the evidence of crimes. He concludes, "Viewed in historical perspective, the whole problem of entrapment has stemmed from a judicial reaction to the means used by police to achieve presence at such illegal transactions, either in person or through the agency of informers."

The first case to reach this court was, of course *Sorrells v. United States*, 287 U.S. 435. The Court in that case characterized the evidence at page 441 as follows:

> "It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, law abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent soliciation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War."

The evidence, therefore, showed a classic case for entrapment, which the court found should have been submitted to the jury. The majority found as its basis for this conclusion a principle of statutory construction—that the Congress did not intend that the class of persons who had been so solicited or induced would come within the class of people covered by the statute. The concurring opinion did not take issue with the solicitation aspect of the case; the difference involved a disagreement over the underlying rationale for entrapment. The concurring opinion stated that the correct rationale for entrapment was public policy and to protect the purity of the courts from being used in such an improper manner by governmental officials.

From this premise the concurring opinion concluded that under the supervisory power of the court, the trial judge should decide if the governmental conduct was improper and if so, find entrapment as a matter of law.

It was not until 1958 that this Court next had occasion to consider the entrapment problem, in *Sherman v. United States*, 356 U.S. 369. The Court was unanimous in reversing Sherman's conviction, holding as a matter of law that entrapment had been established. Mr. Chief Justice Warren, speaking for the Court, characterized the evidence as follows, at page 376:

> "The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. Selecting the proper time, the informer then tells the government agent. The setup is accepted by the agent without even a question as to the manner in which the informer encountered the seller. Thus the Government plays on the weakness of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this."

The majority held that, "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations." 356 U.S. at 372. Speaking for four members of the court, Mr. Justice Frankfurter adopted the reasoning of the concurring opinion of Mr. Justice Roberts in *Sorrells*, that the activities of solicitation and inducement by the informer should not be tolerated by the court.

Since *Sherman*, this court has not fully considered the doctrine of entrapment again. In *Osborne v. United States*, 385 U.S. 323, a prosecution in which the defendant was convicted for attempting to bribe a member of a jury panel in a prospective criminal case, the

court dismissed petitioner's entrapment claims where the only showing he could make was that the informer had told petitioner, correctly, that one of the jury panel was the informer's cousin. The court stated, "at the most, Vick's [the informer] statement afforded the petitioner 'opportunities or facilities' for the commission of a criminal offense and that is a far cry from entrapment. [citing *Sherman* and *Sorrells*]" Likewise in *Lopez v. United States*, 373 U.S. 427, the court dismissed the defendant's claim of entrapment as insubstantial.

The cases of entrapment, it is therefore submitted, that have been considered by this Court have been limited to the question of solicitation or inducement. The situation at bar is considerably different and requires a different analysis. In the solicitation cases, the governmental function involves inducing the defendant to do what he was not previously disposed to do. Yet, in this case, assuming the defendant did have the intent to commit the act, the government went far further than providing Richard Russell with the opportunity to do the act—the government agent provided Russell with the only means by which Russell could complete the act of manufacturing, and thus delivering and selling. The United States Government, acting through its employee, has literally created a crime because it provided Richard Russell the missing link between whatever intent he had to commit a crime and the ability to carry out that desire. On the one hand, agents of the Bureau of Narcotics and Dangerous Drugs had gone to the drug supply houses and had requested that they cease dispensing phenyl-2-propanone, (App. 13, 14; Tr. 82) and then having dried up the supply, dangle that very chemical in front of the prospective defendant. It is this conduct which respondent asks this court to condemn.

He believes that there is a qualitative and quantitative difference between solicitation and the type of conduct proven here.

Respondent believes that the courts that have considered cases raising the factual problems presented here, have unanimously adopted respondent's view that the conduct of the government is such that a conviction is improper.[4] Respondent believes that the cases can best

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[4] *United States v. McGrath*, ____ F.2d ____ (7th Cir. September 26, 1972) pet. for writ of cert. filed No. 72-761, filed November 22, 1972, a case wherein the government supplied counterfeit paper currency to the defendant and then convicted him for the unlawful possession. Despite the defendant's conceded predisposition, the court held, "We find it repugnant to the most elemental notions of justice to permit law enforcement personnel to manufacture counterfeit bills, deliver them, and then arrest the recipient for possession of contraband. . . . more significantly, the harm to society derived from the agents' actions than from the defendant's."

United States v. Bueno, 447 F.2d 903 (5th Cir. 1971), a case where the defendant, a narcotics addict, had been supplied with the illegal drug by the informer, that the defendant then delivered to the undercover agent. The court held, 447 F.2d at 906, "We hold that as a matter of law, if these facts be true, the Defendant cannot be convicted of the possession, handling and sale of the heroin."

Greene v. United States, 454 F.2d 783 (9th Cir. 1971); ". . . when the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which renders entrapment repugnant to American criminal justice are operative."

United States v. Chisum, 312 F.Supp. 1307 (C.D. Cal. 1970) a case where a defendant volunteered he desired counterfeit currency and was arrested for possession of the same after the currency was delivered by an undercover government agent. "When the government supplies the contraband, the receipt of which is illegal, the government cannot be permitted to punish the one receiving it. To permit the government to do so would be to countenance violations of justice." 312 F.Supp. at 1312.

be analyzed and explained if the cases are considered from the due process point of view, rather than attempting to fit them into the traditional entrapment doctrine and, if that is true, that the appropriate due process analogy is in the Fourth Amendment exclusionary rules for search and seizure, and in the Fifth Amendment prohibition to the introduction of coerced confessions and self-incrimination, and the related Sixth Amendment exclusion of post indictment police line-ups held in the absence of counsel.

An analysis of the entrapment cases reveals a wide diversity of reasons as to why the various courts hold as they do. The respondent here respectfully suggests that what the courts find repugnant is the activity of the particular government agent involved—be it undercover agent or informer. It is the same problem that gave rise to the Bill or Rights and the proud heritage of the government of laws under which we operate—that is, the constant desire of the overzealous law enforcement officer to get the evidence from the defendant himself, thus obviating the long, difficult and time-consuming investigative work necessary for the successful prosecution of any case. As this Court concluded in another context in *Mapp v. Ohio*, 367 U.S. 643, 660:

> "The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people

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Other District Court cases in accord are *United States v. Silva*, 180 F.Supp. 557 (S.D.N.Y. 1959) and *United States v. Dillet*, 265 F.Supp. 980 (S.D.N.Y. 1966).

The State cases are in agreement. *People v. Strong*, 21 Ill.2d 320, 172 N.E.2d 65; *State v. Boccelli*, 105 Ariz. 495, 467 P.2d 740; *State v. Sainz*, Ct.App. New Mexico, September 29, 1972.

rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by State officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment."

Indeed, there have been suggestions that the Due Process Clause of the Fifth Amendment is applicable in entrapment cases and the decisions of this Court. In *Sorrells v. United States*, 287 U.S. 435, in rejecting the arguments that entrapment is unavailable to a criminal defendant except in very narrowly confined areas, the court stated at page 446:

"It is manifest that these arguments [against the use of entrapment] rest entirely upon the letter of the statute. They take no account of the fact that its application in the circumstances under consideration is foreign to its purpose; *that such an application is so shocking to the sense of justice that it has been urged that it is the duty of the court to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers and to preserve the purity of its court.*" (Emphasis supplied)

Next, in *Sherman v. United States*, 356 U.S. 369, 373, the statement is made:

"Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, 'a different question is presented

when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.' 287 U.S. at 442. *The stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search.*" (Emphasis supplied)

It is this last analogy that respondent believes is applicable in the present case. Indeed, in a somewhat different context, this court has held that entrapment does violate the Due Process Caluse. In *Raley v. Ohio*, 360 U.S. 423, the Un-American Activities Commission of Ohio told certain witnesses that they were entitled to rely upon the State privilege against self-incrimination, the witnesses so did, but they were subsequently indicted and convicted for a refusal to answer certain questions put by the Committee. This court held, 360 U.S. at 425-6:

"We hold that in the circumstances of these cases, the judgments of the Ohio Supreme Court affirming the convictions violated the Due Process Clause of the Fourteenth Amendment except as to one conviction, as to which we are equally divided. After the Commission, speaking for the State, acted as it did, to sustain Ohio Supreme Court's judgment would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him."

The four justices, in their separate opinion did not take issue with that standard in holding that the one witness was not entrapped, as he had been directed specifically to answer the question put to him. This separate opinion stated, "In this posture of the facts

there could be no entrapment and hence no lack of due process." 360 U.S. at 445.

The evils that are sanctioned should this type of procedure be allowed promote disobedience of the laws in order to punish; encourage law enforcement officials to participate in crimes; permit unrestricted ability of overzealous law enforcement agents selectively to set up defendants for prosecution; result in a sham trial because the evidence has already been provided by the prosecution; countenance an effective violation of the Fifth Amendment right to self incrimination, as it makes the defendant supply evidence of his own guilt, thus effectively incriminating himself; and is an affront to basic notions of justice.

The same considerations apply here that led this Court to bring a halt to the "silver platter doctrine", *Elkins v. United States*, 364 U.S. 206; that applied the exclusionary rule of the Fourth Amendment to the states, *Mapp v. Ohio*, 367 U.S. 643; that ruled out the coerced confession, *Escobedo v. Illinois*, 378 U.S. 478, *Miranda v. Arizona*, 384 U.S. 436; and that governed the finding that the Sixth Amendment required the right to counsel at a post-indictment line up, *U.S. v. Wade*, 388 U.S. 218. As the court stated in *Mapp v. Ohio*, 367 U.S. 643 at page 659:

> "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly that its failure to observe its own laws, or worse, its disregard of the character of its own existence."

The respondent asks this court to condemn the practice wherein government agents provide the indispensible ingredients of crime and then prosecute those to

whom these ingredients have been furnished, as a violation of Due Process.

The only suggestion made by petitioner in its brief as to why these fundamental principles do not apply is the suggestion in a footnote, page 19-20, that it would be improper to expand these rights "to persons whose legitimate interests were *not* in fact violated." This statement, of course, assumes the answer, and if legitimate interests are invaded, the opposite conclusion must follow. Clearly, respondent had a legitimate interest, even assuming predisposition, in being afforded due process requirements that control government conduct.

If the respondent is correct in his analysis that Due Process considerations govern, the obvious proper analogy to determine whether or not Due Process has been violated is to find the analogy in other Due Process areas—search and seizure and coerced confessions—rather than to turn to the historic discussions of entrapment, which, has been pointed out, are not appropriate to the problem raised by this case. Petitioner, in its brief, has completely missed the point raised by respondent and accepted by the Court of Appeals below. The only argument made by the petitioner is that the cases upon which the Court of Appeals relied were wrongly decided and that the court below made an artificial exception to the usual rules. Yet respondent respectfully points out that the Government does in fact agree with respondent. At page 32 of its brief, the Government makes the following statement:

> "It may be that due process precludes criminal conviction for engaging in conduct that would not have been possible without the participation and

assistance of a government agent who supplied an indispensible means to the commission of the crime that could not have been obtained otherwise, through legal or illegal channels."

That is, simply put, the position of respondent. Whether or not the record supports that state of facts is, then, the matter of dispute between the petitioner and respondent. But assuming that it is found that (1) agent Shapiro supplied the phenyl-2-propanone which was used in the reaction on December 10, 1969; (2) that phenyl-2-propanone was hard to acquire due to the Government's efforts in suppressing the supply; (3) that phenyl-2-propanone was indispensible for the manufacturing of methamphetamine on December 10, 1969; and (4) that respondent was indicted for the manufacturing, possessing and distributing methamphetamine that resulted from the chemical reaction on December 10, 1969, all the considerations that are outlined by respondent above come into play because the factual record supports them.

II.

UNDER TRADITIONAL PRINCIPLES OF ENTRAPMENT, RESPONDENT WAS ENTRAPPED AS A MATTER OF LAW

In the alternative, it is clear that respondent was entrapped as a matter of law under even the rationale of the majority opinions of *Sorrells v. United States*, 287 U.S. 435 and *Sherman v. United States*, 356 U.S. 369. In *Sorrells*, 287 U.S. at 444-5, the opinion of the Court states:

"The federal courts have generally approved the statement of Circuit Judge Sanborn in the leading case of *Butts v. United States, supra*, [273 Fed. 35, 38 (8th Cir.)] as follows: 'The first duties of the officers of the law are to prevent, not to punish crime. *It is not their duty to incite to and create*

crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, pursuaded, and lured him to attempt to commit it.'" (Emphasis supplied)

There is not one bit of direct evidence in this case that Richard Russell had been in the past or could have been guilty of committing the crime charged without the active participation of the government agent, Shapiro. Richard Russell was never guilty and could not have been guilty had he not been inspired and lured by Shapiro. There can be no more undisputed aspect of this case. The petitioner attempts to tag Russell with prior activities of the Connolly brothers and the subsequent activity in January of John Connolly. The respondent challenges the petitioner to point to one place in the record where there is a showing that Richard Russell had ever been involved in any manufacturing, possessing or distributing illegal drugs.

Next, in *Sherman v. United States*, 356 U.S. 369, the well known quotation at page 372 appears:

"In *Sorrells v. United States*, 287 U.S. 435, this Court firmly recognized the defense of entrapment in the federal courts. The intervening years have in no way detracted from the principles underlying that decision. The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. . . .

> However, the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law enforcement officials (emphasis supplied). See 287 U.S. at 441, 451."

Regardless of whether we are here concerned with the manufacturing or creative aspect of the law enforcement involvement, there can be no question but that entrapment was established as a matter of law. The respondent agrees with the petitioner that undercover agents are necessary for the proper enforcement of crime; that stealth, artifice and strategem are necessary for adequate law enforcement. Where the respondent does take vigorous exception with petitioner, is in petitioner's view that the supplying of the indispensible ingredient for the manufacturing of methamphetamine is simply an isolated event, not very important and all that Shapiro was doing was "offering to supply one of the chemical ingredients. . . ." (Pet. Brief, p. 31) The petitioner is simply misreading the record in an attempt to avoid the obvious—the critical nature of the activities of the undercover agent in supplying the one drug that, without which, everything else was useless. As the court below noted:

> "While it is true that Russell and his co-defendants were supplied with only one ingredient of the illicit drug, that ingredient was as essential to the perpetuation of Russell's alleged crimes as was the heroin in *Bueno* and the counterfeit money in *Chisum*. Russell would have been powerless to 'commit' the charged offenses without the Government's pervasive intervention."

Likewise, as the court noted in *United States v. McGrath*, ____ F.2d ____ (7th Cir. September 26, 1972), "Accordingly, the rationale of *Sorrells*, where the Government apparently engineered the crime, applies equally to a situation where the Government itself performs essential parts of a criminal offense that might not otherwise have been committed."

In the court below, the government contended that respondent could not avail himself of the entrapment argument because of his predisposition, whatever that was, precluded raising the defense. No case, however, to respondent's knowledge so holds in circumstances where the government has become involved to the extent as it has in this case. Whatever the rule may be in solicitation cases, this is not such a case and the government cannot make it so. In the court below, the government attempted to rely upon language contained in *Sorrells* to state that the defense of entrapment was foreclosed in this type of case. In *Sorrells*, the court stated at 287 U.S. at 435, "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." Each and every case cited in support of that proposition, however, was a solicitation case and thus really does not advance the Government's cause at all. *Grimm v. United States*, 156 U.S. 604, was a prosecution for mailing an obscene picture through the mail, where the picture was solicited by a decoy letter sent by a government agent. *Goode v. United States*, 159 U.S. 663, involved the conviction for embezzlement and theft of mail by a mailman, where the letter containing the money was a decoy. *Rosen v. United States*, 161 U.S. 29, was likewise a prosecution for mailing of obscene material, where the objectionable mailing was sent in reply to a decoy solicitation letter.

Likewise was *Andrews v. United States*, 162 U.S. 420, *Price v. United States*, 165 U.S. 311 and *Bates v. United States*, 10 Fed. 92. *United States v. Reisenweber*, 288 Fed. 520, was a prohibition case where a restaurant was prosecuted as a common nuisance and the evidence for the crime was provided by policemen who frequented the restaurant. Finally, *Aultman v. United States*, 289 Fed. 251 involved prosecution for the unlawful importation of cocaine and morphine. In that case, the informer and the government agent solicited and induced the importation. There is no case holding that where the government becomes so involved in crime as to be the *sine qua non*, that the defendant cannot raise the issue of entrapment, regardless of his predisposition. It would completely free any law enforcement officer to do whatever he wished to make any person commit a crime regardless of predisposition. For, if this Court sanctions the type of conduct undertaken by the undercover agent in this case, there is nothing further that agents need, and the defense of entrapment will be effectively eliminated. When the government agents can provide with impunity the necessary elements to complete the crime, there is nothing further that remains. The respondent does not believe that to be the law.

III.

THE UNDERLYING RATIONALE FOR ENTRAPMENT REQUIRES FOCUSING ON THE CONDUCT OF THE GOVERNMENT

Should the court view the facts of this case as giving rise to the traditional entrapment case, it is then appropriate to examine the underlying rationale for the defense. As noted, this problem has divided this Court in the cases heretofore raising the issue. In *Sorrells v. United*

States, 287 U.S. 435, the majority concluded at page 448:

> "We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them."

Thus, the majority viewed the question as one of statutory interpretation and fashioned its answer on an intent that no Congress has ever affirmed or denied. This view was reaffirmed in *Sherman v. United States*, 356 U.S. 369, where, at page 372, Mr. Chief Justice Warren stated, "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations."

The concurring opinions viewed the problem somewhat differently. In *Sorrells*, Mr. Justice Roberts, speaking for himself, Mr. Justice Brandeis and Mr. Justice Stone, held that entrapment should be an objective inquiry, focusing on the conduct of the law enforcement officer. "The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court." 287 U.S. at 457. In *Sherman*, four members of this court adopted this approach.

> "The courts refused to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about his conviction cannot be countenanced. 356 U.S. at 380."

In *Lopez v. United States*, 373 U.S. 427, at 434-5, the court stated:

> "The conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents. Such conduct, of course, is far different from the permissible strategems involved in the detection and prevention of crime. Thus before the issue of entrapment can fairly be said to have been presented in the criminal prosecution there must have been at least some showing of the kind of conduct by government agents which may well have induced the accused to commit the crime charge." (Emphasis by the Court).

The court in *Lopez* held that regardless of which was the correct view of entrapment that, "... under any theory, entrapment has not been shown as a matter of law. Indeed, the paucity of the showing might well have justified a refusal to instruct the jury at all on entrapment." 373 U.S. 427 at 436.

The respondent respectfully suggests that time has shown the inadequacies of the view of entrapment as espoused by the majority opinions in *Sorrells* and *Sherman* and that the proper understanding of entrapment is articulated by the concurring opinions of Mr. Justice Roberts and Mr. Justice Frankfurter.

There are several reasons why the analysis that focuses solely on the innocence or predisposition of a defendant is inadequate. First of all is the conceptual difficulty. It is recognized that a defendant is not entitled to an entrapment defense if the solicitation, inducement or drug itself is provided by a private citizen; therefore, the moral aspect of the solicitation or furnishing is not the evil nor can the innocence or predisposition of defendant

be relevant. If the inducement or providing is done by a private person, the defense is simply unavailable. The only difference when the solicitation or providing is done by agents of the prosecution is the fact of the supplier's employment—that of a investigative agency or special employee. Under those circumstances, entrapment is available regardless of the view adopted. It must follow then, that the fact of government employment is the important focus, but under the traditional majority view that becomes unimportant.

If the fact of employment is the essential factor then it would seem obvious that the essential focus should be on that factor—the governmental activity—and not on the defendant's "innocence" or lack thereof. This problem has never been resolved by the majority view.

Secondly, focusing on the innocence or predisposition of a defendant has the direct effect of making what is permissible or impermissible depend upon the particular defendant involved, depending upon his predisposition. If the defendant turns out to be "otherwise innocent" the police practice turns out to be impermissible and, therefore, the defendant is not guilty of a crime; on the other hand, if it turns out that the defendant had a predisposition or was not "otherwise innocent", then the police practice of solicitation or whatever it was is appropriate and the defendant is guilty of a new crime. But the respondent believes, as Mr. Justice Frankfurter correctly stated, "Permissible police activity does not vary according to the particular defendant concerned, . . ." *Sherman v. United States*, 356 U.S. at 383.

There is a subsidiary problem to the above difficulty in that it makes a criminal of a person who is in a class of persons who are found to be "predisposed", i.e., those

who harbor an intent to commit an act will be criminals, but those who do not have such an intent will not be, all this determined prior to the commission of the act, as both must concededly subsequently have done to the solicitation, otherwise there would be no prosecution. This status classification runs counter to this Court's opinion in *Robinson v. California*, 370 U.S. 660, which holds that a state could not punish a person for being a narcotics addict.

Additionally, the requirement that a defendant be "otherwise innocent", is completely misleading. Every single defendant who has succumbed to the government solicitations, as indeed they all have otherwise there would be no prosecution, is not innocent as all have committed acts which the Congress has determined to be illegal. That one defendant resisted the government's inducements ten times hardly makes him less predisposed that one who has succumbed immediately. One may be tired, one may need money or not need it, one may be wary, the other unwary, one may take a personal liking or disliking to the soliciting agent; there are many reasons outside of one's desire to commit or not commit a crime all of which are extrinsic to "predisposition" or "innocence", and make such a distinction meaningless.

Additionally, to require a defendant to prove he has no "predisposition" or is "otherwise innocent" under the majority view permits the introduction of all kinds of hearsay, speculation and rumor, all of which is inadmissible in any other context, in order to prove the defendant's "predisposition". While juries are regularly instructed to the contrary, it strains reason to believe that the average juror does not consider such evidence as substantive probing of the defendant's guilt of the actual crime charged, and not simply his "predisposition".

Lastly, permitting juries to speculate about "predisposition" or "otherwise innocence", "Cannot give significant guidance for official conduct for the future. Only the court, through the gradual evolution of explicit standards in accumulated precedents, can do this with the degree of certainty that wise administration of criminal justice demands." Mr. Justice Frankfurter concurring in *Sherman v. United States*, 356 U.S. 369 at 385.

On the other hand, adopting the approach espoused by Mr. Justice Roberts and Mr. Justice Frankfurter in their concurring opinions, does not have with it such attendant problems.[5] It permits an objective evaluation

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[5]Both the suggested Proposed New Federal Criminal Code (1971), Final Report of the National Commission on Reform of Federal Criminals Laws, Section 702 and The Model Penal Code, Section 2.13 (Proposed Official Draft, 1962), adopt the objective test outlined by Mr. Justice Roberts and Mr. Justice Frankfurter. Entrapment in Section 702 would occur "when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment." The conduct of the government agent squarely fits this definition. He certainly used "means" likely to cause respondent to commit the crime; indeed, he provided the only "means" by which respondent could commit any crime.

Petitioner objects to this proposed test because it "... would seem to confer a wholly gratuitous benefit." (Pet. brief fn. 13, p. 20). Petitioner ignores the fundamental fact that law enforcement officers are likewise subject to the restraints of the law. Petitioner should heed the statement of this Court in *McNabb v. United States*, 318 U.S. 332, 343, where the practice of holding accused persons before taking them before a magistrate was invalidated:

"A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law

by the court in which the inquiry focuses on the conduct of the investigating agents. The basic evil to which the courts are addressing here is the conduct of overzealous law enforcement personnel. It is the age old problem of who is to watch the policeman, so that there can be confidence in the administration of law enforcement. The only way that has ever been found that is effective to restrain the overaggressive law enforcement activity is to block the introduction of the fruits of that activity from admission in the ensuing prosecution. The only entity that can do that is, of course, the trial court. The adoption of the views of the concurring judges will foster that salutory approach.

CONCLUSION

For the above stated reasons, the Court of Appeals was clearly correct and its opinion should be affirmed.

Respectfully submitted,

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Robert E. Prince
Co-counsel

December, 1972

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enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience therefore has counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic."

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1585

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD RUSSELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

INTRODUCTION

Respondent concedes that his primary position is that the conduct of the undercover agent in this case "does not involve entrapment at all [under] the classic definition" (Br. 10).[1] The "position of respondent"

[1] Despite this concession respondent nevertheless attempts to show that under the traditional test adopted in *Sorrells* v. *United States*, 287 U.S. 435, and *Sherman* v. *United States*, 356 U.S. 369, the undercover agent's activities constituted entrapment as a matter of law (See Resp. Br. 21-25). This argument, which flatly contradicts respondent's concession in the court of appeals that "[t]he jury could find from the testimony that the government had not unlawfully entrapped Russell * * *" (Court of Appeals Br. 7; Pet. App. 18), is answered in our main brief (pp. 10-25).

is that a new defense to a charge of activity made criminal by an act of Congress (or a state legislature) should be created by this Court, under the Due Process Clause, where it is shown that the conduct would not have been possible had not an undercover agent "'supplied an indispensable means to the commission of the crime that could not have been obtained otherwise, through legal or illegal channels'" (Br. 20-21). The Amici Curiae, on the other hand, urge the Court to exercise its "inherent supervisory power" (ACLU Br. 7), to create a similar defense where an undercover agent "suppl[ies] the contraband upon which a prosecution is based" (ACLU Br. 21).

We note at the outset that, even if the Court were to accept either of these arguments, and took the unprecedented step of creating a defense to illegal activity undertaken in violation of a valid act of Congress, the judgment of conviction in this case would have to be sustained. The record demonstrates that the phenyl-2-propanone ("P-2-P") was obtainable through non-government sources, although it may have been "hard to acquire due to the Government's efforts in suppressing the supply" (Resp. Br. 21). The undisputed evidence establishes that, despite this difficulty, respondent and his accomplices were able to obtain the P-2-P independently before and after the undercover agent appeared (Brief for the United States 2-5, 31-32).

Similarly, the record does not support the defense urged by the amici, since no contraband was supplied to respondent and his accomplices by government

agents. The possession and sale of P-2-P was and remains perfectly legal. P-2-P is not a controlled substance, and only voluntary restraint by manufacturers and suppliers limited its production and availability. Accordingly, the only issue presented by this case is whether the action of the undercover agent in supplying a chemical ingredient, available from other channels, constitutes a defense to a charge of manufacturing, processing, possessing and selling methamphetamines, where respondent and his accomplices proceeded knowingly and voluntarily, without any overbearing or duress, to manufacture the illicit drug that they were predisposed to produce.

I. THERE ARE NO COMPELLING REASONS FOR JUDICIAL CREATION OF A NEW SUBSTANTIVE DEFENSE TO CRIMINAL LIABILITY BROADER THAN THE TRADITIONAL ENTRAPMENT DEFENSE

We have shown in our main brief that, under well accepted standards, the conduct of the undercover agent here was proper, and that it does not differ in any material way from similar activity which has been repeatedly sanctioned by this Court (Br. 27–33). As we believe respondent has conceded, the investigative conduct in this case respected the boundaries established by the entrapment defense as formulated in *Sherman* and *Sorrells*. The policy arguments advanced by the respondent and the amici do not warrant a departure from these accepted standards.

A. Respondent argues that the "evils that are sanctioned" by permitting undercover agents to undertake

the activity present here include (1) the provocation of "disobedience of the laws in order to punish"; (2) the encouragement of "law enforcement officials to participate in crimes"; and (3) the "unrestricted ability of overzealous law enforcement agents selectively to set up defendants for prosecution" (Br. 19). Respondent also claims that this conduct constitutes an "effective violation of the Fifth Amendment right to [sic] self incrimination, as it makes the defendant supply evidence of his own guilt, thus effectively incriminating himself; and is an affront to basic notions of justice" (Br. 19). These claims are without foundation either in general practice or in the record of this case and furnish no basis for the creation of the defense that has been proposed.

The activity of the undercover agent here was not undertaken, as respondent alleges, to "promote disobedience * * * in order to punish," but to apprehend those already engaged in an illicit drug operation. Any doubt that this was the basis for the undercover agent's activities is dispelled by the admission of respondent's accomplice (Tr. 148–149) that, at the first meeting involving himself, respondent, and the undercover agent, on December 7, 1969, he told the undercover agent that he had been manufacturing the illicit drug since May 1969, and had produced about three pounds of it. The care taken here by the undercover agent to insure that respondent and his accomplice were actually engaged in the illicit manufacture of drugs—he did not supply the P-2-P until he had seen the laboratory and had been given a sample of meth-

amphetamines that had been previously produced there—clearly renders hollow any claim here that an "overzealous" law enforcement official "selectively * * * set up defendants for prosecution."

Respondent's claim that his privilege against self-incrimination was violated, because he was made to "supply evidence of his own guilt," is frivolous. He was not "compelled" to supply evidence of his guilt. The very basis of his conviction is that he knowingly and willingly manufactured the illicit drug. Moreover, the privilege against self-incrimination is applicable only to "testimonial compulsion," *Schmerber* v. *California*, 384 U.S. 757, so it cannot cover the drugs he manufactured and sold to the undercover agent. And respondent's incriminating statements to the undercover agent during the course of his criminal enterprise were "wholly voluntary," and no right protected by the privilege was violated by the agent's conduct. See *Hoffa* v. *United States*, 385 U.S. 293, 303. See also *Lewis* v. *United States*, 385 U.S. 206, 209–210, holding that the deception and stratagem employed by undercover agents overstepped no constitutional bounds. Compare *United States* v. *White*, 401 U.S. 745, 749.[2]

[2] Respondent's somewhat contradictary argument, that the trial was rendered "a sham" because "the evidence ha[d] already been provided by the prosecution" (Resp. Br. 19), is equally frivolous. In any event, the evidence here, the methamphetamines which respondent and his accomplices manufactured, was not supplied by the undercover agent; he supplied only a harmless chemical. It was respondent and his accomplices who supplied "the evidence."

Thus the "considerations" which respondent claims led to the adoption of various exclusionary rules (Br. 19) are not present here. Passing by the important distinction between formulation of a rule excluding certain evidence and creation of a new defense to criminal liability, we reiterate that in this case the undercover agent did not violate any express provisions of the Bill of Rights (*Weeks* v. *United States*, 232 U.S. 383), did not violate any federal statute or rule (*Sabbath* v. *United States*, 391 U.S. 585; *McNabb* v. *United States*, 318 U.S. 332, 342), and did not commit any crime (*Nardone* v. *United States*, 308 U.S. 338). As Judge Parker observed in *Sorrells* v. *United States*, 57 F. 2d 973, 978 (C.A. 4), reversed on other grounds, 287 U.S. 435:

> There is no analogy between the rule here under consideration [entrapment] and that which forbids the use on the trial of evidence obtained by a search in violation of the Fourth and Fifth Amendments to the Constitution. These amendments forbid the use of governmental force to search a man's home, his person, his papers, or his effects * * *; and evidence obtained in violation of the amendments is not admissible for the reason that to admit it would nullify the constitutional rights of the accused. * * * Here there is no contention that any constitutional right of the accused has been violated; and the question is, not as to the admissibility of evidence, but as to the validity of an asserted defense to crime.

Even apart from the facts in this case, there is little basis for adopting a rule that allows those who

predisposed to commit a crime to avoid responsibility for it by arguing that the agents engaged in conduct that might have tempted even an innocent man. The apparent objective of such a rule—deterrence against overreaching—is hardly demonstrable or compelling. As the relative infrequency of successful entrapment claims suggests, overworked federal agents and local police do not wander around mindlessly trying to seduce random innocent citizens. An undercover operation typically involves pursuit of a particular lead.[*] Often the lead suggests specific ongoing criminal activity that can only be verified and proved from within. As is so often the case with drug rings, it may be impossible to gather concrete evidence of past violations; thus, it has been considered not only appropriate but also a matter of public responsibility to take a "test boring," as it were, of the suspect's current activities.

For this reason, the "participation" of undercover agents in the criminal ventures, for the purpose of detection and prosecution of the participants, has been repeatedly recognized as a legitimate law enforcement technique. Drug offenses, like the present case, are a "prime example" of the kind of crimes suitable for undercover activity, since they are "committed in secret under such circumstances that perpetrators might never be discovered if government representatives were not permitted to participate to some ex-

[*] See Rotenberg, *The Police Detection Practice of Encouragement*, 49 Va. L. Rev. 871, 875 (1963): "The nature of the process demands this, for it is too complex and time-consuming a technique to be used on a hit-or-miss basis."

tent." *Whiting* v. *United States*, 321 F. 2d 72, 76 (C.A. 1), certiorari denied, 375 U.S. 884. See, also, *United States* v. *Milisci*, 465 F. 2d 700 (C.A. 5), petitions for certiorari pending (Nos. 72–5528 and 72–5865); *United States* v. *Ortega* (C.A. 2, Nos. 72–1479, 72–1482, decided December 11, 1972, slip. op. 881–907), petitions for certiorari pending (Nos. 72–1098 and 72–1103).

B. The policy reasons advanced by the amici are equally unpersuasive. The amici concede that it is appropriate for "agents of the government to offer to a suspected person an opportunity to commit a crime, because otherwise many crimes, especially those involving contraband, could not otherwise be detected" (ACLU Br. 21). They argue, however, that the "state has an interest only in apprehending those engaged in criminal activity by the mere offer of a neutral opportunity," and that "[t]here is no state interest in intervening in contraband trade in such a way as to obtain any result other than an arrest based upon an opportunity" (*ibid.*).

But, even assuming *arguendo* that the undercover agent here went beyond providing a "neutral opportunity," the argument of amici is erroneous in contending that the state is "not acting within the bounds of its legitimate interest" when its investigators do more than passively provide such an opportunity. As the traditional entrapment doctrine demonstrates, the state does not have any interest in prosecuting an individual who, but for the activity of its agents, would not have engaged in criminal activity because he was not predisposed to do so. It could also be argued that there is no legitimate interest in prose-

ecting a person who, even though desirous of committing the crime, would have been incapable of committing the offense due to impossibility of obtaining the material necessary for its commission. See Note, *The Serpent Beguiled Me And I Did Eat—The Constitutional Status of the Entrapment Defense*, 74 Yale L. J. 942, 949 (1965). But where, as in this case, the accused had the disposition to commit the offense, had engaged in similar conduct, and was able to do so without the assistance of the undercover agent, the government had a legitimate and indeed compelling interest in his apprehension and prosecution, as long as the means employed were not inconsistent with a specific provision of the Constitution or a statute.

The amici argue, however, that if a defendant is "willing to commit the crime and would have done so if he had been able," then the government should have "wait[ed] until he did commit it *sua sponte*" (ACLU Br. 22). This argument overlooks the difficulty in detecting criminal activity of this kind—a difficulty which the amici concede is present here. It is easy to say that the government should have waited until respondent and his accomplices committed the offense "*sua sponte*," but it is much more difficult to say how law enforcement officials should go about detecting clandestine crime and apprehending the offenders without infiltrating their operation in this manner. The amici suggest that it was perfectly proper to offer to purchase the drug for cash rather than in exchange for one of the ingredients. But whether this was the best means of penetrating the illicit drug operation is essentially a question of practical judgment to be

made on a case by case basis by those having expertise in law enforcement matters. Plainly the decision to employ one technique rather than another, in the absence of a violation of the Constitution or a statute, hardly justifies the adoption of a *per se* rule requiring the acquittal of a defendant.

Any doubt in any individual case whether the defendant would have committed a crime of the kind charged, without government intervention, can be determined by the jury under appropriate instructions. That traditional defense, which results in acquittal if the jury entertains a reasonable doubt about the particular defendant's predisposition toward the crime, sufficiently reconciles the innocent individual's interest in not being seduced into crime with the public's interest in uncovering and prosecuting wrongdoers.

II. CREATION OF THE KIND OF SUBSTANTIVE DEFENSE ASSERTED HERE IS A LEGISLATIVE RATHER THAN A JUDICIAL FUNCTION

The foregoing discussion has assumed for the sake of argument that the courts have the *power* to create a new substantive defense to criminal liability under a valid statute that has concededly been violated. We have endeavored to show why no such defense should be created, conferring immunity on the guilty because government agents became involved in the criminal enterprise to an "intolerable degree." But it is not clear that such a power should properly be allocated to the courts, and, even if the courts have such a power, its exercise to create a new "entrapment" defense would not be appropriate.

This Court has never asserted any inherent "supervisory power" to create defenses to criminal activity. The exclusionary rules adopted by the Court to deter or remedy violations of the Constitution or federal statute have been held to arise from the traditional role of courts in formulating rules of evidence. See *McNabb* v. *United States, supra,* 318 U.S. at 341:

> The function of formulating rules of evidence in areas *not governed by statute* has always been one of the chief concerns of courts * * * [a]nd in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance [emphasis added].

The area here—the definition of crimes and the creation of defenses—is one which is governed by statute, and the adoption of a defense not contemplated by Congress necessarily effects a partial repeal of the statute defining the offense. The power of the Court to accomplish such a result is limited to procedural matters and even then, formal submission of the proposal to Congress for its acquiescence or rejection is required. See 18 U.S.C. 3771, 3772.

The arguments advanced by respondent and the amici are plainly insufficient to overcome the strong constitutional and policy considerations against interfering with the "wide range of power that the legislature possesses to adapt its penal laws to conditions as they may exist * * *." *Weems* v. *United States,* 217 U.S. 349, 379; *Powell* v. *Texas,* 392 U.S. 514, 536. Cf.

Spencer v. *Texas*, 385 U.S. 554. The judicial creation of a defense to proscribed activity, unless fairly found to be within the scope of the legislative intent, necessarily qualifies the legislative determination and intrudes into the legislative sphere. See Ratner, *The Function of the Due Process Clause*, 116 U. Pa. L. Rev. 1048, 1063-1068 (1968). The traditional entrapment doctrine, formulated by the Court in *Sorrells* and adhered to in *Sherman*, *supra*, is faithful to these distinctions. The traditional defense is based on the reasonable gleaning of congressional intent that "otherwise innocent" persons induced or encouraged by government agents into committing the proscribed acts should not be punished. It is appropriate to conclude that Congress did not intend to punish people who are in effect innocent victims of cajolery or coercion.

In contrast, the defense that respondent and the amici urge this Court to adopt cannot be said to reflect what must necessarily be congressional intent. The proposed defense is not a rule of evidence; it proceeds on the premise that the defendant is not an "otherwise innocent" or unpredisposed individual, but it would nevertheless create an immunity to punishment predicated solely upon the nature of the government's investigative and detection methods. Within the limits prescribed by the Bill of Rights, however, the weighing of the moral and policy considerations implicit in regulating police conduct by immunizing criminal activity is the province of the legislative branch of government. As far as can be deduced from

federal criminal statutes, their legislative history, and their traditional mode of enforcement, Congress has not decided that persons who are predisposed to commit crimes should receive immunity based on the extent to which undercover investigators participated in the venture.

Moreover, the adoption of the "due process defense" urged by respondent would not only mark an incursion on the Congressional domain, but would apply generally to all state prosecutions, and open the doors of the federal courts to scores of habeas corpus applications in every case in which the defense of entrapment is involved. The "appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction" (*McNabb* v. *United States*, 318 U.S. 332, 340) compels the rejection of a rigid constitutional rule in an area which calls for policy judgments on law enforcement techniques.*

Finally, we point out that judicial "abstention" from the creation of any new entrapment defense is particularly appropriate at this time in view of the fact that Congress will shortly examine the relevant

*The Court has declined to attach a constitutional mandate even to well established common law defenses, such as "insanity, mistake * * * and duress." *Powell* v. *Texas*, 392 U.S. 514, 536; cf. *Spencer* v. *Texas*, 385 U.S. 554, 563–564. And the courts of appeals and district courts have likewise declined to follow such a path with respect to the entrapment defense; they have consistently refused to entertain collateral attacks on state judgments of conviction where defendants have sought to mitigate entrapment defenses. See *e.g.*, *United States ex rel. Hall* v. *Illinois*, 329 F. 2d 354 (C.A. 7), certiorari denied, 379 U.S. 891, and cases cited in our main brief p. 30, n. 19.

issues as part of its in-depth consideration of several proposals to revise the entire federal criminal code. When it does so, the Congress will have the full range of entrapment proposals before it. As we noted in our main brief, the National Commission on Reform of Federal Criminal Laws in its Final Report has urged adoption of an entrapment test similar to that advanced by the minority in *Sorrells* and *Sherman*.[4] The Department of Justice, on the other hand, for the reasons expressed in our opening brief, will support retention of the traditional entrapment test espoused by the majority of this Court in those two cases.[5] A third proposal is included in the bill (S. 1, 93d Cong.) introduced by Senators McClellan, Ervin, and Hruska on January 4, 1973, which combines features of both the above approaches.[6] In view of the

[4] Section 702 of the National Commission's suggested code defines entrapment as occurring "when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment."

[5] The Department has not yet decided whether to urge codification of most defenses; thus it is not yet certain whether its proposal will be embodied in the bill it plans to submit to Congress, or whether it will merely urge that existing law be left undisturbed.

[6] Section 1-3B2 of S. 1 defines entrapment as occurring "when a law enforcement officer or a person requested by a law enforcement officer to assist him induces or encourages a person to engage in prohibited conduct, using such methods of induce-

plenary consideration which Congress will shortly give to this problem, there is no occasion for the Court to use this case as a vehicle for wholesale reevaluation of the entrapment question. Compare *United States* v. *Kras*, No. 71-749, decided January 10, 1973, slip op. 17-18 (concurring opinion of Chief Justice Burger).

As we have already stated, however, we believe there is no need for the Court to break new ground in this case since, under any of the tests proposed above or any other reasonable test, the conduct of the government undercover agent here, taking into consideration all the circumstances of the case, cannot be deemed to have caused the commission of an offense that otherwise would not have been committed. See *Lopez* v. *United States*, 373 U.S. 427, 434.

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ment or encouragement as create a substantial risk that the conduct would be committed by persons other than those who are ready to commit it. Conduct merely affording a person an opportunity to engage in prohibited conduct does not constitute entrapment. A risk is less substantial where a person has previously engaged in similarly prohibited conduct and such conduct is known to such officer as a person assisting him." This general definition renders a defendant's predisposition relevant, but not determinative, of the existence of an entrapment defense. The Section would also except crimes involving the causing or threatening of bodily injury from its coverage. See Section 1-3B2(c).

CONCLUSION

For the reasons stated in our main brief and this reply brief, it is respectfully submitted that the judgment of the court below should be reversed and the judgment of conviction reinstated.

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* RUSSELL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71-1585. Argued February 27, 1973—Decided April 24, 1973

An undercover narcotics agent investigating respondent and his confederates for illicitly manufacturing a drug, offered them an essential ingredient which was difficult to obtain, though legally available. After the agent had observed the process and contributed the ingredient in return for a share of the finished product, respondent was found guilty by a jury which had been given the standard entrapment instruction. The Court of Appeals reversed, concluding that there had been "an intolerable degree of governmental participation in the criminal enterprise." *Held:* The entrapment defense, which, as explicated in *Sorrells* v. *United States*, 287 U. S. 435, and *Sherman* v. *United States*, 356 U. S. 369, prohibits law enforcement officers from instigating criminal acts by otherwise innocent persons in order to lure them to commit crimes and punish them, did not bar the conviction of respondent in view of the evidence of respondent's involvement in making the drug before and after the agent's visits, and respondent's concession "that he may have harbored a predisposition to commit the charged offenses." Nor was the agent's infiltration of the drug-making operation of such a nature as to violate fundamental principles of due process. Pp. 5-13.

469 F. 2d 671, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN, J., joined. STEWART, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–1585

United States, Petitioner, v. Richard Russell. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April 24, 1973]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Richard Russell was charged in three counts of a five count indictment returned against him and codefendants John and Patrick Connolly.[1] After a jury trial in the District Court, in which his sole defense was entrapment, respondent was convicted on all three counts of having unlawfully manufactured and processed methamphetamine ("speed") and of having unlawfully sold and delivered that drug in violation of 21 U. S. C. §§ 331 (q)(1), (2), 360a (a), (b) (Supp. V, 1964). He was sentenced to concurrent terms of two years in prison for each offense, the terms to be suspended on the condition that he spend six months in prison and be placed on probation for the following three years. On appeal the United States Court of Appeals for the Ninth Circuit, one judge dissenting, reversed the conviction solely for the reason that an undercover agent supplied an essential chemical for manufacturing the methamphetamine which formed the basis of respondent's conviction. The court concluded that as a matter of law "a defense to a

[1] John Connolly did not appear for trial. Patrick Connolly was tried with the respondent and found guilty of all five counts against him. The validity of his conviction is not before us in this proceeding.

criminal charge may be founded upon an intolerable degree of governmental participation in the criminal enterprise." *United States v. Russell*, 459 F. 2d 671, 673 (CA9 1972). We granted certiorari, 409 U. S. 911 (1972), and now reverse that judgment.

There is little dispute concerning the essential facts in this case. On December 7, 1969, Joe Shapiro, an undercover agent for the Federal Bureau of Narcotics and Dangerous Drugs, went to respondent's home on Whidbey Island in the State of Washington where he met with respondent and his two codefendants, John and Patrick Connolly. Shapiro's assignment was to locate a laboratory where it was believed that methamphetamine was being manufactured illicitly. He told the respondent and the Connollys that he represented an organization in the Pacific Northwest that was interested in controlling the manufacture and distribution of methamphetamine. He then made an offer to supply the defendants with the chemical phenyl-2-propanone, an essential ingredient in the manufacture of methamphetamine, in return for one-half of the drug produced. This offer was made on the condition that Agent Shapiro be shown a sample of the drug which they were making and the laboratory where it was being produced.

During the conversation Patrick Connolly revealed that he had been making the drug since May 1969 and since then had produced three pounds of it.[2] John Connolly gave the agent a bag containing a quantity of methamphetamine that he represented as being from "the last batch that we made." Shortly thereafter, Shapiro and Patrick Connolly left respondent's house to view the laboratory which was located in the Connolly house on Whidbey Island. At the house Shapiro ob-

[2] At trial Patrick Connolly admitted making this statement to Agent Shapiro but asserted that the statement was not true.

served an empty bottle bearing the chemical label phenyl-2-propanone.

By prearrangement Shapiro returned to the Connolly house on December 9, 1969, to supply 100 grams of propanone and observe the chemical reaction. When he arrived he observed Patrick Connolly and the respondent cutting up pieces of aluminum foil and placing them in a large flask. There was testimony that some of the foil pieces accidentally fell on the floor and were picked up by the respondent and Shapiro and put into the flask.[2] Thereafter Patrick Connolly added all of the necessary chemicals, including the propanone brought by Shapiro, to make two batches of methamphetamine. The manufacturing process having been completed the following morning, Shapiro was given one-half of the drug and respondent kept the remainder. Shapiro offered to buy, and the respondent agreed to sell, part of the remainder for $60.

About a month later Shapiro returned to the Connolly house and met with Patrick Connolly to ask if he was still interested in their "business arrangement." Connolly replied that he was interested but that he had recently obtained two additional bottles of phenyl-2-propanone and would not be finished with them for a couple of days. He provided some additional methamphetamine to Shapiro at that time. Three days later Shapiro returned to the Connolly house with a search warrant and, among other items, seized an empty 500-gram bottle of propanone and a 100-gram bottle, not the one he had provided, that was partially filled with the chemical.

There was testimony at the trial of respondent and Patrick Connolly that phenyl-2-propanone was generally

[2] Agent Shapiro did not otherwise participate in the manufacture of the drug or direct any of the work.

difficult to obtain. At the request of the Bureau of Narcotics and Dangerous Drugs, some chemical supply firms had voluntarily ceased selling the chemical.

At the close of the evidence, and after receiving the District Judge's standard entrapment instruction,[1] the jury found the respondent guilty on all counts charged. On appeal the respondent conceded that the jury could have found him predisposed to commit the offenses, 459 F. 2d, at 672, but argued that on the facts presented there was entrapment as a matter of law. The Court of Appeals agreed, although it did not find the District Court had misconstrued or misapplied the traditional standards governing the entrapment defense. Rather, the court in effect expanded the traditional notion of entrapment, which focuses on the predisposition of the defendant, to mandate dismissal of a criminal prosecution whenever the court determines that there has been "an intolerable degree of governmental participation in the criminal enterprise." In this case the court decided that the conduct of the agent in supplying a scarce ingredient essential for the manufacture of a controlled substance established that defense.

This new defense was held to rest on either of two alternative theories. One theory is based on two lower court decisions which have found entrapment, regardless of predisposition, whenever the government supplies contraband to the defendants. *United States* v. *Bueno*, 447

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[1] The District Judge stated the governing law on entrapment as follows: "Where a person has the willingness and the readiness to break the law, the mere fact that the government agent provides what appears to be a favorable opportunity is not entrapment." He then instructed the jury to acquit respondent if it had a "reasonable doubt whether the defendant had the previous intent or purpose to commit the offense . . . and did so only because he was induced or persuaded by some officer or agent of the government." No exception was taken by respondent to this instruction.

F. 2d 903 (CA5 1971); *United States* v. *Chisum*, 312 F. Supp. 1307 (CD Cal. 1970). The second theory, a nonentrapment rationale, is based on a recent Ninth Circuit decision that reversed a conviction because a government investigator was so enmeshed in the criminal activity that the prosecution of the defendants was held to be repugnant to the American criminal justice system. *Greene* v. *United States*, 454 F. 2d 783 (CA9 1971). The court below held that these two rationales constitute the same defense, and that only the label distinguishes them. In any event, it held that "[b]oth theories are premised on fundamental concepts of due process and evince the reluctance of the judiciary to countenance 'overzealous law enforcement.'" 459 F. 2d, at 674, quoting *Sherman* v. *United States*, 356 U. S. 369, 381 (1958) (Frankfurter, J., concurring).

This Court first recognized and applied the entrapment defense in *Sorrells* v. *United States*, 287 U. S. 435 (1932).[1] In *Sorrells* a federal prohibition agent visited the defendant while posing as a tourist and engaged him in conversation about their common war experiences. After gaining the defendant's confidence the agent asked for some liquor, was twice refused, but upon asking a third time the defendant finally capitulated, and was subsequently prosecuted for violating the National Prohibition Act.

Chief Justice Hughes, speaking for the Court, held that as a matter of statutory construction the defense of entrapment should have been available to the defendant. Under the theory propounded by the Chief Justice, the entrapment defense prohibits law enforcement officers from instigating criminal acts by persons "otherwise in-

[1] The first case to recognize and sustain a claim of entrapment by government officers as a defense was apparently *Woo Wai* v. *United States*, 223 F. 412 (CA9 1915).

nocent in order to lure them to its commission and to punish them." 287 U. S., at 448. Thus, the thrust of the entrapment defense was held to focus on the intent or predisposition of the defendant to commit the crime. "[I]f the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." 287 U. S., at 451.

Justice Roberts concurred in the result but was of the view "that courts must be closed to the trial of a crime instigated by the government's own agents." 287 U. S., at 459.* The difference in the view of the majority and the concurring opinions is that in the former the inquiry focuses on the predisposition of the defendant, whereas in the latter the inquiry focuses on whether the government "instigated the crime."

In 1958 the Court again considered the theory underlying the entrapment defense and expressly reaffirmed the view expressed by the *Sorrells* majority. *Sherman* v. *United States*, 356 U. S. 369 (1958). In *Sherman* the defendant was convicted of selling narcotics to a government informer. As in *Sorrells* it appears that the government agent gained the confidence of the defendant and, despite initial reluctance, the defendant finally acceded to the repeated importunings of the agent to commit the criminal act. On the basis of *Sorrells*, this Court reversed the affirmance of the defendant's conviction.

In affirming the theory underlying *Sorrells*, Chief Justice Warren for the Court, held that "[t]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." 356 U. S., at 372. Justice Frankfurter stated in a concurring opinion that

* Justices Brandeis and Stone concurred in this analysis.

he believed Justice Roberts had the better view in *Sorrells* and would have framed the question to be asked in an entrapment defense in terms of "whether the police conduct revealed in the particular case falls below standards . . . for the proper use of governmental power." 356 U. S., at 382.[1]

In the instant case respondent asks us to reconsider the theory of the entrapment defense as it is set forth in the majority opinions in *Sorrells* and *Sherman*. His principal contention is that the defense should rest on constitutional grounds. He argues that the level of Shapiro's involvement in the manufacture of the methamphetamine was so high that a criminal prosecution for the drug's manufacture violates the fundamental principles of due process. The respondent contends that the same factors that led this Court to apply the exclusionary rule to illegal searches and seizures, *Weeks* v. *United States*, 232 U. S. 383 (1914); *Mapp* v. *Ohio*, 367 U. S. 643 (1961), and confessions, *Miranda* v. *Arizona*, 384 U. S. 436 (1966), should be considered here. But he would have the Court go further in deterring undesirable official conduct by requiring that any prosecution be barred absolutely because of the police involvement in criminal activity. The analogy is imperfect in any event, for the principal reason behind the adoption of the exclusionary rule was the government's "failure to observe its own laws." *Mapp* v. *Ohio*, *supra*, 367 U. S., at 659. Unlike the situations giving rise to the holdings in *Mapp* and *Miranda*, the government's conduct here violated no independent constitutional right of the respondent. Nor did Shapiro violate any federal statute or rule or commit any crime in infiltrating the respondent's drug enterprise.

[1] Justices Douglas, Harlan, and Brennan shared the views of entrapment expressed in the Frankfurter concurrence.

Respondent would overcome this basic weakness in his analogy to the exclusionary rule cases by having the Court adopt a rigid constitutional rule that would preclude any prosecution when it is shown that the criminal conduct would not have been possible had not an undercover agent "supplied an indispensable means to the commission of the crime that could not have been obtained otherwise, through legal or illegal channels." Even if we were to surmount the difficulties attending the notion that due process of law can be embodied in fixed rules, and those attending respondent's particular formulation, the rule he proposes would not appear to be of significant benefit to him. For on the record presented it appears that he cannot fit within the terms of the very rule he proposes.[6]

The record discloses that although the propanone was difficult to obtain it was by no means impossible. The defendants admitted making the drug both before and after those batches made with the propanone supplied by Shapiro. Shapiro testified that he saw an empty bottle labeled phenyl-2-propanone on his first visit to the laboratory on December 7, 1969. And when the laboratory was searched pursuant to a search warrant on January 10, 1970, two additional bottles labeled phenyl-2-propanone were seized. Thus, the facts in the record amply demonstrate that the propanone used in the illicit manufacture of methamphetamine not only *could* have been obtained without the intervention of Shapiro but was in fact obtained by these defendants.

While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to

[6] The language quoted above first appeared in the government's brief at 32, but was subsequently adopted by the respondent. Respondent's Brief, at 20–21.

obtain a conviction, cf. *Rochin* v. *California*, 342 U. S. 165 (1952), the instant case is distinctly not of that breed. Shapiro's contribution of propanone to the criminal enterprise already in process was scarcely objectionable. The chemical is by itself a harmless substance and its possession is legal. While the government may have been seeking to make it more difficult for drug rings, such as that of which respondent was a member, to obtain the chemical, the evidence described above shows that it nonetheless was obtainable. The law enforcement conduct here stops far short of violating that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause of the Fifth Amendment. *Kinsella* v. *United States ex rel. Singleton*, 361 U. S. 234, 246 (1960).

The illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise. In order to obtain convictions for illegally manufacturing drugs, the gathering of evidence of past unlawful conduct frequently proves to be an all but impossible task. Thus in drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of apprehension; if that be so, then the supply of some item of value that the drug ring requires must, as a general rule, also be permissible. For an agent will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them. Law enforcement tactics such as this can hardly be said to violate "fundamental fairness" or "shocking to the universal sense of justice," *Kinsella*, *supra*.

Respondent also urges, as an alternative to his constitutional argument, that we broaden the nonconstitu-

tional defense of entrapment in order to sustain the judgment of the Court of Appeals. This Court's opinions in *Sorrells* v. *United States*, *supra*, and *Sherman* v. *United States*, *supra*, held that the principal element in the defense of entrapment was the defendant's predisposition to commit the crime. Respondent conceded in the Court of Appeals, as well he might, "that he may have harbored a predisposition to commit the charged offenses." 459 F. 2d, at 672. Yet he argues that the jury's refusal to find entrapment under the charge submitted to it by the trial court should be overturned and the views of Justices Roberts and Frankfurter, concurring in *Sorrells* and *Sherman*, respectively, which make the essential element of the defense turn on the type and degree of governmental conduct, be adopted as the law.

We decline to overrule these cases. *Sorrells* is a precedent of long standing that has already been once reexamined in *Sherman* and implicitly there reaffirmed. Since the defense is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable.*

Critics of the rule laid down in *Sorrells* and *Sherman* have suggested that its basis in the implied intent of Congress is largely fictitious, and have pointed to what they conceive to be the anomalous difference between the treatment of a defendant who is solicited by a private individual and one who is entrapped by a government agent. Questions have been likewise raised as to whether "predisposition" can be factually established with the requisite degree of certainty. Arguments such as these, while not devoid of appeal, have been twice

* A bill currently before the Congress contemplates an express statutory formulation of the entrapment defense. S. 1, 93d Cong., 1st Sess., § 1-3B2 (1973).

previously made to this Court, and twice rejected by it, first in *Sorrells* and then in *Sherman*.

We believe that at least equally cogent criticism has been made of the concurring views in these cases. Commenting in *Sherman* on Justice Roberts' position in *Sorrells* that "although the defendant could claim that the government had induced him to commit the crime, the government could not reply by showing the defendant's criminal conduct was due to his own readiness and not to the persuasion of government agents," *Sherman* v. *United States*, *supra*, 356 U. S., at 376–377, Chief Justice Warren quoted the observation of Judge Learned Hand in an earlier stage of that proceeding:

> "'Indeed, it would seem probable that, if there were no reply [to the claim of inducement], it would be impossible ever to secure convictions of any offenses which consist of transactions that are carried on in secret.' *United States* v. *Sherman*, 200 F. 2d 880, 882." *Sherman* v. *United States*, *supra*, 356 U. S., at 377 n. 7.

Nor does it seem particularly desirable for the law to grant complete immunity from prosecution to one who himself planned to commit a crime, and then committed it, simply because government undercover agents subjected him to inducements which might have seduced a hypothetical individual who was not so predisposed. We are content to leave the matter where it was left by the Court in *Sherman*:

> "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, 'A different question is presented when the criminal design origi-

nates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.'" 356 U. S., at 372, quoting *Sorrells* v. *United States*, *supra*, 287 U. S., at 442.

Several decisions of the United States district courts and courts of appeals have undoubtedly gone beyond this Court's opinions in *Sorrells* and *Sherman* in order to bar prosecutions because of what they thought to be for want of a better term "overzealous law enforcement." But the defense of entrapment enunciated in those opinions was not intended to give the federal judiciary a "chancellor's foot" veto over law enforcement practices of which it did not approve. The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations. We think that the decision of the Court of Appeals in this case quite unnecessarily introduces an unmanageably subjective standard which is contrary to the holdings of this Court in *Sorrells* and *Sherman*.

Those cases establish that entrapment is a relatively limited defense. It is rooted not in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been "overzealous law enforcement," but instead in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a prescribed offense, who was induced to commit them by the government.

Sorrells and *Sherman* both recognize "that the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution," 287 U. S., at 441; 356 U. S., at 372. Nor will the mere fact of

deceit defeat a prosecution, see, *e. g.*, *Lewis* v. *United States*, 385 U. S. 206, 208–209 (1966), for there are circumstances when the use of deceit is the only practicable law enforcement technique available. It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play.

Respondent's concession in the Court of Appeals that the jury finding as to predisposition was supported by the evidence is, therefore, fatal to his claim of entrapment. He was an active participant in an illegal drug manufacturing enterprise which began before the government agent appeared on the scene, and continued after the government agent had left the scene. He was, in the words of *Sherman*, *supra*, not an "unwary innocent" but an "unwary criminal." The Court of Appeals was wrong, we believe, when it sought to broaden the principle laid down in *Sorrells* and *Sherman*. Its judgment is therefore

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 71-1585

United States, Petitioner, v. Richard Russell. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April 24, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

A federal agent supplied the accused with one chemical ingredient of the drug known as methamphetamine ("speed") which the accused manufactured and for which act he was sentenced to prison. His defense was entrapment, which the Court of Appeals sustained and which the Court today disallows. Since I have an opposed view of entrapment, I dissent.

My view is that of Justice Brandeis expressed in *Casey* v. *United States*, 276 U. S. 413, 421 (dissent), that of Justice Frankfurter stated in *Sherman* v. *United States*, 356 U. S. 369, 378 (concurrence), and that of Justice Roberts contained in *Sorrells* v. *United States*, 287 U. S. 435, 453 (concurrence).

In my view, the fact that the chemical ingredient supplied by the federal agent might have been obtained from other sources is quite irrelevant. Supplying the chemical ingredient used in the manufacture of this batch of "speed" made the United States an active participant in the unlawful activity. As stated by Justice Brandeis, dissenting in *Casey* v. *United States*, *supra*, at 423:

> "I am aware that courts—mistaking relative social values and forgetting that a desirable end cannot justify foul means—have, in their zeal to punish, sanctioned the use of evidence obtained through criminal violation of property and personal rights or

by other practices of detectives even more revolting. But the objection here is of a different nature. It does not rest merely upon the character of the evidence or upon the fact that the evidence was illegally obtained. The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the Government; that the act for which the Government seeks to punish the defendant is the fruit of their criminal conspiracy to induce its commission. The Government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature."

Justice Frankfurter stated the same philosophy in *Sherman v. United States, supra*, at 382–383:

"No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society." And he added:

"The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime. . . ." *Id.*, at 384.

Mr. Justice Roberts in *Sorrells* put the idea in the following words:

"The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy." 287 U. S., at 459.

May the federal agent supply the counterfeiter with the kind of paper or ink that he needs in order to get a

quick and easy arrest? The Court of Appeals in *Greene* v. *United States*, 454 F. 2d 783, speaking through Judges Hamley and Hufstedter, said "no" in a case where the federal agent treated the suspects "as partners" with him, offered to supply them with a still, a still site, still equipment, and an operator and supplied them with sugar. *Id.*, at 786.

The Court of Appeals in *United States* v. *Bueno*, 447 F. 2d 903, speaking through Judges Roney, Coleman, and Simpson held that where an informer purchased heroin for the accused who in turn sold it to a federal agent, there was entrapment because the sale was made "through the creative activity of the government." *Id.*, at 906.

In *United States* v. *Chisum*, 312 F. Supp. 1307, the federal agent supplied the accused with the counterfeit money, the receipt of which was the charge against him. Judge Ferguson sustained the defense of entrapment saying, "When the government supplies the contraband, the receipt of which is illegal, the government cannot be permitted to punish the one receiving it." *Id.*, at 1312.

The Court of Appeals in the instant case relied upon this line of decisions in sustaining the defense of entrapment, 459 F. 2d 671. In doing so it took the view that the "prostitution of the criminal law," as Justice Roberts described in it *Sorrells*, 287 U. S., at 457, was the evil at which the defense of entrapment is aimed.

Federal agents play a debased role when they become the instigators of the crime, or partners in its commission, or the creative brain behind the illegal scheme. That is what the federal agent did here when he furnished the accused with one of the chemical ingredients needed to manufacture the unlawful drug.

SUPREME COURT OF THE UNITED STATES

No. 71-1585

United States, Petitioner, v. Richard Russell. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April 24, 1973]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

It is common ground that "[t]he conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents." *Lopez* v. *United States*, 373 U. S. 429, 434 (1963). For the Government cannot be permitted to instigate the commission of a criminal offense in order to prosecute someone for committing it. *Sherman* v. *United States*, 356 U. S. 369, 372 (1958). As Mr. Justice Brandeis put it, the Government "may not provoke or create a crime and then punish the criminal, its creature." *Casey* v. *United States*, 276 U. S. 413, 423 (1928) (dissenting opinion). It is to prevent this situation from occurring in the administration of federal criminal justice that the defense of entrapment exists. *Sorrells* v. *United States*, 287 U. S. 435 (1932); *Sherman* v. *United States*, *supra*. Cf. *Masciale* v. *United States*, 356 U. S. 386 (1958); *Lopez* v. *United States*, *supra*. But the Court has been sharply divided as to the proper basis, scope, and focus of the entrapment defense, and as to whether, in the absence of a conclusive showing, the issue of entrapment is for the judge or the jury to determine.

I

In *Sorrells* v. *United States*, *supra*, and *Sherman* v. *United States*, *supra*, the Court took what might be called a "subjective" approach to the defense of entrap-

ment. In that view, the defense is predicated on an unexpressed intent of Congress to exclude from its criminal statutes the prosecution and conviction of persons, "otherwise innocent," who have been lured to the commission of the prohibited act through the Government's instigation. *Sorrells* v. *United States*, *supra*, at 448. The key phrase in this formulation is "otherwise innocent," for the entrapment defense is available under this approach only to those who would not have committed the crime but for the Government's inducements. Thus, the subjective approach focuses on the conduct and propensities of the particular defendant in each individual case: if he is "otherwise innocent," he may avail himself of the defense; but if he had the "predisposition" to commit the crime, or if the "criminal design" originated with him, then—regardless of the nature and extent of the Government's participation—there has been no entrapment. *Id.*, at 451. And, in the absence of a conclusive showing one way or the other, the question of the defendant's "predisposition" to the crime is a question of fact for the jury. The Court today adheres to this approach.

The concurring opinion of Mr. Justice Roberts, joined by Justices Brandeis and Stone, in the *Sorrells* case, and that of Mr. Justice Frankfurter, joined by Justices DOUGLAS, Harlan, and BRENNAN, in the *Sherman* case, took a different view of the entrapment defense. In their concept, the defense is not grounded on some unexpressed intent of Congress to exclude from punishment under its statutes those otherwise innocent persons tempted into crime by the Government, but rather on the belief that "the methods employed on behalf of the Government to bring about conviction cannot be countenanced." *Sherman* v. *United States*, *supra*, at 380. Thus, the focus of this approach is not on the propensities and predisposition of a specific defendant, but on

"whether the police conduct revealed in the particular case falls below the standards, to which common feelings respond, for the proper use of governmental power." *Id.*, at 382. Phrased another way, the question is whether—regardless of the predisposition to crime of the particular defendant involved—the governmental agents have acted in such a way as is likely to instigate or create a criminal offense. Under this approach, the determination of the lawfulness of the Government's conduct must be made—as it is on all questions involving the legality of law enforcement methods—by the trial judge, not the jury.

In my view, this objective approach to entrapment advanced by the concurring opinions in *Sorrells* and *Sherman* is the only one truly consistent with the underlying rationale of the defense.[1] Indeed, the very basis of the entrapment defense itself demands adherence to an approach that focuses on the conduct of the governmental agents, rather than on whether the defendant was "predisposed" or "otherwise innocent." I find it impossible to believe that the purpose of the defense is to effectuate some unexpressed congressional intent to exclude from its criminal statutes persons who committed a prohibited act, but would not have done so except for the Government's inducements. For, as Mr. Justice Frankfurter put it, "the only legislative intention that can with any show of reason be extracted from the statute is the intention to make criminal precisely the conduct in which the defendant has engaged." *Sherman* v. *United States*, *supra*, at 379. See also *Sorrells* v. *United States*, *supra*, at 456 (Roberts, J., concurring). Since, by definition, the entrapment defense

[1] Both the Proposed New Federal Criminal Code (1971), Final Report of the National Commission on Reform of Federal Criminal Laws, § 702, and the American Law Institute's Model Penal Code, § 2.13 (Proposed Official Draft, 1962), adopt this objective approach.

cannot arise unless the defendant actually committed the proscribed act, that defendant is manifestly covered by the terms of the criminal statute involved.

Furthermore, to say that such a defendant is "otherwise innocent" or not "predisposed" to commit the crime is misleading, at best. The very fact that he has committed an act that Congress has determined to be illegal demonstrates conclusively that he is not innocent of the offense. He may not have originated the precise plan or the precise details, but he was "predisposed" in the sense that he has proved to be quite capable of committing the crime. That he was induced, provoked, or tempted to do so by government agents does not make him any more innocent or any less predisposed than he would be if he had been induced, provoked, or tempted by a private person—which, of course, would not entitle him to cry "entrapment." Since the only difference between these situations is the identity of the temptor, it follows that the significant focus must be on the conduct of the government agents, and not on the predisposition of the defendant.

The purpose of the entrapment defense, then, cannot be to protect persons who are "otherwise innocent." Rather, it must be to prohibit unlawful governmental activity in instigating crime. As Mr. Justice Brandeis stated in *Casey* v. *United States*, *supra*, at 425: "This prosecution should be stopped, not because some right of Casey's has been denied, but in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts." Cf. *Olmstead* v. *United States*, 277 U. S. 438, 470 (1928) (Holmes, J., dissenting); *id.*, at 485 (Brandeis, J., dissenting). If that is so, then whether the particular defendant was "predisposed" or "otherwise innocent" is irrelevant; and the important question becomes whether

the Government's conduct in inducing the crime was beyond judicial toleration.

Moreover, a test that makes the entrapment defense depend on whether the defendant had the requisite predisposition permits the introduction into evidence of all kinds of hearsay, suspicion, and rumor—all of which would be inadmissible in any other context—in order to prove the defendant's predisposition. It allows the prosecution, in offering such proof, to rely on the defendant's bad reputation or past criminal activities, including even rumored activities of which the prosecution may have insufficient evidence to obtain an indictment, and to present the agent's suspicions as to why they chose to tempt this defendant. This sort of evidence is not only unreliable, as the hearsay rule recognizes; but it is also highly prejudicial, especially if the matter is submitted to the jury, for, despite instructions to the contrary, the jury may well consider such evidence as probative not simply of the defendant's predisposition, but of his guilt of the offense with which he stands charged.

More fundamentally, focusing on the defendant's innocence or predisposition has the direct effect of making what is permissible or impermissible police conduct depend upon the past record and propensities of the particular defendant involved. Stated another way, this subjective test means that the Government is permitted to entrap a person with a criminal record or bad reputation, and then to prosecute him for the manufactured crime, confident that his record or reputation itself will be enough to show that he was predisposed to commit the offense anyway.

Yet in the words of Mr. Justice Roberts:

"Whatever may be the demerits of the defendant or his previous infractions of law these will not jus-

tify the instigation and creation of a new crime, as a means to reach him and punish him for his past misdemeanors. To say that such conduct by an official of government is condoned and rendered innocuous by the fact that the defendant had a bad reputation or had previously transgressed is wholly to disregard the reason for refusing the processes of the court to consummate an abhorrent transaction." *Sorrells* v. *United States*, *supra*, at 458–459.

And as Mr. Justice Frankfurter pointed out:

"Permissible police activity does not vary according to the particular defendant concerned; surely if two suspects have been solicited at the same time in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition. No more does it vary according to the suspicions, reasonable or unreasonable, of the police concerning the defendant's activities." *Sherman* v. *United States*, *supra*, at 383.

In my view, a person's alleged "predisposition" to crime should not open him to government participation in the criminal transaction that would be otherwise unlawful.[2]

This does not mean, of course, that the Government's use of undercover activity, strategy, or deception is necessarily unlawful. *Lewis* v. *United States*, 385 U. S.

[2] See Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs, 60 Yale L. J. 1091, 1111 (1951):

"Clearly entrapment is a facet of a broader problem. Along with illegal search and seizures, wire tapping, false arrest, illegal detention and the third degree, it is a type of lawless law enforcement. They all spring from common motivations. Each is a substitute for skillful and scientific investigation. Each is condoned by the sinister supposition that the end, when dealing with known criminals or the 'criminal classes,' justifies the employment of illegal means."

208, 208–209 (1966). Indeed, many crimes, especially so-called victimless crimes, could not otherwise be detected. Thus, government agents may engage in conduct that is likely, when objectively considered, to afford a person ready and willing to commit the crime an opportunity to do so. *Osborn* v. *United States*, 385 U. S. 323, 331–332 (1966). See also *Sherman* v. *United States*, *supra*, at 383–384 (Frankfurter, J., concurring).

But when the agents' involvement in criminal activities goes beyond the mere offering of such an opportunity, and when their conduct is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it, then—regardless of the character or propensities of the particular person induced—I think entrapment has occurred. For in that situation, the Government has engaged in the impermissible manufacturing of crime, and the federal courts should bar the prosecution in order to preserve the institutional integrity of the system of federal criminal justice.[3]

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[3] Several federal courts have adopted the objective test advanced by Mr. Justice Roberts and Mr. Justice Frankfurter, or a variant thereof, focusing on the conduct of the government agents, rather than the "predisposition" of the particular defendant. See, *e. g.*, *United States* v. *McGrath*, 468 F. 2d 1027, 1030–1031 (CA7 1972); *Greene* v. *United States*, 454 F. 2d 783, 786–787 (CA9 1971); *Carbajal-Portillo* v. *United States*, 396 F. 2d 944, 948 (CA9 1968); *Smith* v. *United States*, 118 U. S. App. D. C. 38, 331 F. 2d 784, 790, 792 (1964) (*en banc*); *United States* v. *Chisum*, 312 F. Supp. 1307 (CD Cal. 1970). Cf. *United States* v. *Morrison*, 348 F. 2d 1003, 1004 (CA2 1965); *Accardi* v. *United States*, 257 F. 2d 168, 172–173 n. 5 (CA5 1958); *United States* v. *Kros*, 296 F. Supp. 972, 979 (ED Pa. 1969). Moreover, this objective approach is the one favored by a majority of the commentators. In addition to the Proposed New Federal Criminal Code and the Model Penal Code, *supra*, n. 1, see Williams, The Defense of Entrapment and Related Problems in Criminal Prosecution, 28 Fordham L. Rev. 399 (1959); Cowen, The Entrapment Doctrine in the Federal Courts, and Some

II

In the case before us, I think that the District Court erred in submitting the issue of entrapment to the jury, with instructions to acquit only if it had a reasonable doubt as to the respondent's predisposition to committing the crime. Since, under the objective test of entrapment, predisposition is irrelevant and the issue is to be decided by the trial judge, the Court of Appeals, I believe, would have been justified in reversing the conviction on this basis alone. But since the appellate court did not remand for consideration of the issue by the District Judge under an objective standard, but rather found entrapment as a matter of law and directed that the indictment be dismissed, we must reach the merits of the respondent's entrapment defense.

Since, in my view, it does not matter whether the respondent was predisposed to commit the offense of which he was convicted, the focus must be, rather, on the conduct of the undercover government agent. What the agent did here was to meet with a group of suspected producers of methamphetamine, including the respondent; to request the drug; to offer to supply the chemical phenyl-2-propanone in exchange for one-half of the methamphetamine to be manufactured therewith; and, when that offer was accepted, to provide the needed chemical ingredient, and to purchase some of the drug from the respondent.

It is undisputed that phenyl-2-propanone is an essential ingredient in the manufacture of methamphetamine; that it is not used for any other purpose; and that, while its sale is not illegal, it is difficult to obtain, be-

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State Court Comparisons, 49 J. of Crim. L., Criminology, and P. S. 447 (1959); Donnelly, *supra*, n. 2; Comment, Entrapment in the Federal Courts, 1 U. S. F. L. Rev. 177 (1966).

cause a manufacturer's license is needed to purchase it, and because many suppliers, at the request of the Federal Bureau of Narcotics and Dangerous Drugs, do not sell it at all. It is also undisputed that the methamphetamine which the respondent was prosecuted for manufacturing and selling was all produced on December 10, 1969, and that all the phenyl-2-propanone used in the manufacture of that batch of the drug was provided by the government agent. In these circumstances, the agent's undertaking to supply this ingredient to the respondent, thus making it possible for the Government to prosecute him for manufacturing an illicit drug with it, was, I think, precisely the type of governmental conduct that the entrapment defense is meant to prevent.

Although the Court of Appeals found that the phenyl-2-propanone could not have been obtained without the agent's intervention—that "there could not have been the manufacture, delivery, or sale of the illicit drug had it not been for the Government's supply of one of the essential ingredients," 459 F. 2d 671, 672—the Court today rejects this finding as contradicted by the facts revealed at trial. The record, as the Court states, discloses that one of the respondent's accomplices, though not the respondent himself, had obtained phenyl-2-propanone from independent sources both before and after receiving the agent's supply, and had used it in the production of methamphetamine. This demonstrates, it is said, that the chemical was obtainable other than through the government agent; and hence the agent's furnishing it for the production of the methamphetamine involved in this prosecution did no more than afford an opportunity for its production to one ready and willing to produce it. Cf. *Osborn* v. *United States*, *supra*, at 331–332. Thus, the argument seems to be, there was

no entrapment here, any more than there would have been if the agent had furnished common table salt, had that been necessary to the drug's production.

It cannot be doubted that if phenyl-2-propanone had been wholly unobtainable from other sources, the agent's undercover offer to supply it to the respondent in return for part of the illicit methamphetamine produced therewith—an offer initiated and carried out by the agent for the purpose of prosecuting the respondent for producing methamphetamine—would be precisely the type of governmental conduct that constitutes entrapment under any definition. For the agent's conduct in that situation would make possible the commission of an otherwise totally impossible crime, and, I should suppose, would thus be a textbook example of instigating the commission of a criminal offense in order to prosecute someone for committing it.

But assuming in this case that the phenyl-2-propanone was obtainable through independent sources, the fact remains that that used for the particular batch of methamphetamine involved in all three counts of the indictment with which the respondent was charged—*i. e.*, that produced on December 10, 1969—was supplied by the Government. This essential ingredient was indisputably difficult to obtain, and yet that used in committing the offenses of which the respondent was convicted was offered to the respondent by the government agent, on the agent's own initiative, and was readily supplied to the respondent in needed amounts. If the chemical was so easily available elsewhere, then why did not the agent simply wait until the respondent had himself obtained the ingredients and produced the drug, and then buy it from him? The very fact that the agent felt it incumbent upon him to offer to supply phenyl-2-propanone in return for the drug casts considerable

doubt on the theory that the chemical could easily have been procured without the agent's intervention, and that therefore the agent merely afforded an opportunity for the commission of a criminal offense.

In this case, the chemical ingredient was available only to licensed persons, and the Government itself had requested suppliers not to sell that ingredient even to people with a license. Yet the government agent readily offered and supplied that ingredient to an unlicensed person and asked him to make a certain illegal drug with it. The Government then prosecuted that person for making the drug produced *with the very ingredient* which its agent had so helpfully supplied. This strikes me as the very pattern of conduct that should be held to constitute entrapment as a matter of law.[4]

It is the Government's duty to prevent crime, not to promote it. Here, the Government's agent asked that the illegal drug be produced for him, solved his quarry's practical problems with the assurance that he could provide the one essential ingredient that was difficult to obtain, furnished that element as he had promised, and bought the finished product from the respondent—all so that the respondent could be prosecuted for producing and selling the very drug for which the agent had asked and for which he had provided the necessary component. Under the objective approach that I would follow, this respondent was entrapped, regardless of his predisposition or "innocence."

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[4] Some federal courts have ordered indictments for receipt, possession, or sale of contraband to be dismissed, upon a showing that government agents had themselves supplied the contraband. See *United States* v. *McGrath*, *supra*; *Greene* v. *United States*, *supra*; *United States* v. *Bueno*, 447 F. 2d 903 (CA5 1971); *United States* v. *Chisum*, *supra*; *United States* v. *Dillet*, 265 F. Supp. 980 (SDNY 1966). The same considerations obtain here.

In the words of Mr. Justice Roberts:

"The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy." *Sorrells v. United States*, *supra*, at 450.

I would affirm the judgment of the Court of Appeals.